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Supreme Court of the United States.

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Present MARSHALL, Chief Justice; CUSHING, CHASE, WASHINGTON, JOHNSTON AND LIVINGSTON, Justices.

Fitzsimmons, Plaintiff in Error, *v.* The Newport Insurance Company.

UNDER the treaty between *Great Britain* and the *United States*, the persisting in an intention to enter a blockaded port, unconnected with any fact, is not a just cause of condemnation, because the article requires that the vessel should again attempt to enter after having been warned away. Where the facts stated in a foreign sentence do not in themselves amount to a justifiable cause of condemnation, the cause is open to further evidence. Such a sentence showing on the face of it, that it was founded upon an insufficient cause, does not falsify the warranty of neutrality contained in a policy effected in this country.

ERROR from the Circuit Court for the district of *Rhode-Island*. The action was brought on a policy of insurance, upon the brig *John*, Captain *Barker*, for a voyage from *Charleston* to *Cadiz*, warranting the brig to be *American* property; and stipulating, that the underwriters should not be answerable for any seizure on account of illicit trade. On the trial in the Circuit Court, the jury found a special verdict (on which judg-

ment was rendered in favour of the defendants, the underwriters) containing the following facts:

"We find that the plaintiff on the 12th day of *July*, 1800, "caused himself to be insured five thousand dollars, on the "brigantine *John* of that value, belonging to the plaintiff, on a "voyage from *Charleston* to *Cadiz*, according to the policy and "memorandum.

"That the said brig sailed from *Charleston* under the com- "mand of *R. Barker*, with orders to proceed to *Cadiz*, on the "18th day of *June*, 1800: that being arrived off *Cadiz* said "brigantine was brought to by the *British* fleet employed in the "blockade of *Cadiz;* which port was then blockaded by the fleet "of the king of *Great Britain;* of which the said *R. Barker* was "notified by Captain *Elphinstone* commander of the *Hector* ship "of war, one of the said fleet of the blockade of *Cadiz*, and was "*warned* by him not to proceed to, nor attempt to enter said "port: that on the back of the register of the said brigantine "*John* is the following indorsement, viz. '*Warned not to* "*enter Cadiz or St. Lucar, as they are blockaded; but has per-* "*mission to enter any other port;*' dated, '*Swiftsure, July* 25th, "1800,' and signed by '*B. Hallowell, Captain of the Swiftsure,* "*one of the ships of the blockading squadron;*' but the said *Bar-* "*ker* had no notice *of said indorsement*, until after the condem- "nation of the said brig, hereafter mentioned.

"That the mate of the said brig and four of the seamen "belonging to her were taken out of the said brig, and a prize "master and men sent on board her, from the blockading "squadron; that the said brig was detained by the said fleet from "the 13th day of *July* when she was first stopped as aforesaid "till the 27th day of *July*, 1800; when Captain *Barker* was sent "for on board the Admiral Sir *R. Bickerton's* ship; and the said "Admiral informed him, 'We have thoughts of setting you "at liberty; and in case we do, and deliver you your vessel and "papers, what course will you steer; or what port will you pro- "ceed for?' To which *Barker's* answer was, that '*in case he* "*got no new orders, he should continue to steer by his old ones;*' "upon which the Admiral said '*That is sufficient;* I shall send "you to *Gibraltar* for adjudication.'

"That on the 27th day of *July* the said brig, without being "liberated, was sent into *Gibraltar*, where she arrived the 7th "day of *August*, 1800; and was there libelled in the Vice-Ad- "miralty Court; and on the 27th day of *August*, the following "sentence of condemnation was pronounced. 'The Judge "having heard the said claimant, together with the sundry ex- "aminations taken in preparatory in the cause and the papers "and documents found on board said brig at the time of the cap- "ture and delivered into the register upon oath; and having "further heard the parties, &c. rejected the claim, and *de- "clared the brig to have been cleared out for Cadiz, a port actu- "ally blockaded by the arms of our sovereign lord the king; and "that the master of said brig persisted in his intention of enter- "ing that port, after warning from the blockading force not to do "so, in a direct breach and violation of the blockade thereby noti- "fied*; and pronounced the said brig and cargo by virtue thereof, "or otherwise, subject and liable to confiscation, and con- "demned the same as good and lawful prize to our sovereign "lord and king.'

"We further find, that the plaintiff duly and seasonably "abandoned to the defendants, all his interests and claim to "the said brig to the amount insured: that the first notice the "said *R. Barker* had of the blockade aforesaid, was from the "commander of the ship that stopped him off *Cadiz* as afore- "said: that there was no knowledge or report of said blockade "at *Charleston*, nor did said blockade exist at the time of the "said brig sailing from thence."

The cause was argued on the 1st, 2d and 3d of *February* by Mr. *Dallas*, for the plaintiff in error, and by Mr. *Rawle*, for the defendants, upon the points stated in the opinion of the court, which was delivered by the Chief Justice in the following terms:

MARSHALL, *Chief Justice*. This suit is instituted to recover, from the underwriters, the amount of a policy insuring the brig *John*, on a voyage from *Charleston* to *Cadiz*. The vessel was captured on her passage by a *British* squadron, then blockading that port; was sent into *Gibraltar* for adjudication; and

was there condemned by the Court of Vice-Admiralty, as lawful prize. The assured warrants the vessel to be *American* property; and the defence is, that this warranty is conclusively falsified, by the sentence of condemnation. The points made for the consideration of the Court are,

1st. Is the sentence of a foreign Court of Admiralty conclusive evidence, in an action against the underwriters, of the facts it professes to decide?* If so,

2d. Does this sentence, upon its face, falsify the warranty contained in the policy? If not,

3d. Does not the special verdict exhibit facts which falsify the warranty?

The question on the conclusiveness of a sentence of a foreign court of admiralty, having been more than once elaborately

[* In the Supreme Court of Errors of *Connecticut*, it has been decided, that the sentence of a foreign court of admiralty is conclusive, and cannot be impeached in this country, until regularly set aside in the country where passed. 1 *Day's Cases in Error*, 142.

A sentence in a foreign court of admiralty is not even *prima facie* evidence of any fact, if there appear in it enough to rebut such a presumption. 1 *N. Y. Cases in Error*, xxx.

In an action on a policy of assurance, the sentence of a foreign court of admiralty is not conclusive on the character of the property in opposition to the warranty. 2 *N. Y. Cas. in Err.* 217. A foreign sentence as good prize is not conclusive evidence that the legal title to the property was not in the subject of a neutral nation. 3 *Cranch*, 458.

Judicial acts of foreign tribunals are *prima facie* to be deemed correct; therefore, no inference to be made against them. 2 *N. Y. Cas. in Err.* 110.

A judgment recovered in another of the *United States* is not, in all cases, conclusive evidence of a debt, in an action of debt brought in *Massachusetts*, on such judgment. Although the mode of authenticating such judgments has been provided for by the act of Congress, yet the *effect* of such authentication is not declared by that act. 1 *Mass. Rep.* 402. 1 *N. Y. T. R.* 460. A. brings an action in *Connecticut* on a judgment recovered against B. in *Massachusetts*. B. pleads that, at the time the suit was commenced, upon which that judgment was founded, he was not an inhabitant of *Massachusetts*, nor did he reside there, nor had he any property there; this plea in bar is bad, because there is no averment of the want of legal notice. 1 *Day's Cases in Error* 168.

Quære, Whether *nil debet* is a good plea to an action of debt founded on a judgment of a court of one of the co-states? 1 *Cranch*, 285.]

argued, the Court reluctantly avoids a decision of it at present. But there are particular reasons which restrain one of the Judges from giving an opinion on that point; and another case has been mentioned, in which it is said to constitute the sole question; so that in that case it will of course be determined.

Passing over the consideration of the first point therefore, the Court proceeded to inquire, whether this cause could be decided on the second and third points.

Admitting, for the present, that the sentence of a foreign court of admiralty is conclusive, with respect to what it professes to decide, does this sentence falsify the warranty contained in this policy, that the brig *John* is *American* property?

The sentence declares "the said brig to have been cleared out for *Cadiz*, a port actually blockaded by the arms of our sovereign lord the king; and that the master of the said brig persisted in his intention of entering that port, after warning from the blockading force not to do so, in direct breach and violation of the blockade thereby notified." The sentence, then, does not deny the brig to have been *American* property; but, it is contended by the counsel for the underwriters, that a ship warranted to be *American* is impliedly warranted to conduct herself, during the voyage, as an *American;* and that an attempt to enter a blockaded port, knowing it to be blockaded, forfeits that character. This position cannot be controverted. It remains then to inquire, whether the sentence proves the brig *John* to have violated the laws of blockade: that is, whether the cause of condemnation is alleged in such terms, as to show that the vessel had forfeited her neutral character; or in such terms as to show its insufficiency to support the sentence.

The fact of clearing out for a blockaded port is in itself innocent, unless it be accompanied with a knowledge of the blockade. The clearance therefore is not considered as the offence: the persisting in the intention to enter that port after warning by the blockading force is the ground of the sentence. Is this intention, if evidenced by no fact whatever, a breach of blockade? This question is to be decided by a reference to the

law of nations and to the treaty between the *United States* and *Great Britain*.

Vattel says, " All commerce is entirely prohibited with a besieged town. If I lay siege to a place, or only form the blockade, I have a right to hinder any one from entering, and to treat as an enemy, whoever *attempts* to enter the place, or carry any thing to the besieged without my leave." *B.* 3. *s.* 177. The right to treat the vessel as an enemy is declared by *Vattel* to be founded on the *attempt* to enter; and, certainly, this attempt must be made by a person knowing the fact.

But this subject has been precisely regulated by the treaty between the *United States* and *Great Britain*, which was in force, when this condemnation took place. That treaty contains the following clause: " And whereas it frequently happens, that vessels sail for a port or place belonging to an enemy without knowing that the same is either besieged or blockaded or invested; it is agreed, that every vessel so circumstanced, may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless after notice she shall *again attempt to enter;* but she shall be permitted to go to any other port or place she may think proper." This treaty is conceived to be a correct exposition of the law of nations; certainly it is admitted by the parties to it, as between themselves, to be a correct exposition of that law, or to constitute a rule in the place of it.

Neither the law of nations nor the treaty admits of the condemnation of the neutral vessel, for the intention to enter a blockaded port, unconnected with any fact. Sailing for a blockaded port, knowing it to be blockaded has been, in some *English* cases, construed into an attempt to enter that port; and has, therefore, been adjudged a breach of the blockade, from the departure of the vessel.* Without giving any

[* If the port to which a vessel assured is destined be *actually* blockaded, the assured may abandon as for a total loss; the interdiction of commerce with the port of destination by means of a blockade is a peril within the policy. The going to another port, after being warned away, for the purpose of delivering the goods, was considered, after an abandonment, as done for the benefit of all concerned, and would not destroy the right of the assured to recover on the abandonment. 1 *Johns.* 249.]

opinion on that point, it may be observed, that, in such cases, the fact of sailing is coupled with the intention; and the sentence of condemnation is founded on an actual breach of blockade. The cause assigned would there be a justifiable cause; and it would be for the foreign court alone to determine, whether the testimony supported the allegation, that the blockade was broken. Had this sentence averred, that the brig *John* had broken the blockade, or had attempted to enter the port of *Cadiz* after warning from the blockading force; the cause of condemnation would have been justifiable; and without controverting the conclusiveness of the sentence, the assured could not have entered into any inquiry respecting the conduct of the vessel. But this is not the language of the sentence. An attempt to enter the port of *Cadiz* is not alleged; but persisting in the intention, after being warned not to enter it, is alleged as the cause of condemnation. This is not a good cause under the treaty. It is impossible to read that treaty, without perceiving a clear intention in the parties to it, that, after notice of the blockade, an attempt to enter the port must be made, in order to subject the vessel to confiscation. By the language of the treaty it would appear, that a second attempt, after receiving notice, must be made, in order to constitute the offence, which will justify a confiscation. "It is agreed (says the instrument) that every vessel so circumstanced (that is, every vessel sailing for a blockaded port, without knowledge of the blockade) may be turned away from such port or place; but she shall not be detained, nor her cargo, if not contraband, confiscated, unless, after notice, she shall again attempt to enter." These words strongly import a stipulation, that there shall be a free agency, on the part of the commander of the vessel, after receiving notice of the blockade; and that there shall be no detention nor condemnation, unless, in the exercise of that free agency, a second attempt to enter the invested place shall be made.

It cannot be necessary to state the testimony, which would amount to evidence of such second attempt. Lingering about the place as if watching for an opportunity to sail into it, or the

single circumstance of not making immediately for some other port, or, possibly, obstinate and determined declarations of a resolution to break the blockade—might be evidence of an attempt, after warning, to enter the blockaded port. But whether these circumstances or others may, or may not, amount to evidence of the offence, the offence itself is attempting again to enter; and "unless, after notice, she shall again attempt to enter," the two nations expressly stipulate, that "she shall not be detained, nor her cargo, if not contraband, be confiscated." It would seem, as if aware of the excesses which might be justified by converting intention into offence, the *American* negotiator had required the union of fact with intention, to constitute the breach of blockade.

The cause of condemnation then, described in this sentence, is one, which by express compact between the *United States* and *Great Britain*, is an insufficient cause, unless the intention was manifested in such manner as in fair construction, to be equivalent to an attempt to enter *Cadiz* after knowledge of the blockade. This not being proved by the sentence itself, the parties are let in to other evidence.

However conclusive then, the sentence may be of the particular facts which it alleges, those facts not amounting in themselves to a justifiable cause of condemnation, the Court must look into the special verdict, which explains what is uncertain in the sentence. The special verdict shows, that the vessel was seized on her approaching the port of *Cadiz*, without previous knowledge of the blockade; that she never was turned away and permitted to go to any other port or place;" that she was "detained" for several days, and then sent for adjudication, without being ever put into the possession of her captain and crew so as to enable her either "again to attempt to enter" the port of *Cadiz*, or to sail for some other port; that while thus detained, the commander of the blockading squadron drew the Captain of the *John* into a conversation which must be termed insidious, since its object was to trepan him into expressions, that might be construed into evidence of an intention to sail for *Cadiz*, should he be liberated; and that the

commander, availing himself of some equivocal unguarded and perhaps indiscreet answers, on the part of the captain, the vessel was sent in for adjudication, and on those expressions was condemned.

The Court is of opinion, that these facts do not amount to an attempt again to enter the port of *Cadiz;* and therefore, do not amount, under the treaty between the *United States* and *Great Britain*, to a breach of the blockade of *Cadiz*. The sentence of the Court of Vice-Admiralty in *Gibraltar* consequently is not considered as falsifying the warranty, that the brig *John* was *American* property; or as disabling the assured from recovering against the underwriters in this action; and the testimony in the case shows, that the blockade was not broken.

The judgment of the Circuit Court is to be reversed with costs. And it is to be certified to that Court, that judgment is to be entered on the special verdict for the plaintiff.

Supreme Court of the United States.

FEBRUARY, 1808.

Groudson *v.* Leonard.

BLOCKADE—FOREIGN SENTENCE. An attempt to commit a breach of blockade is a violation of neutrality and authorizes capture. The sentence of a foreign court of competent jurisdiction, condemning property on the ground of its not being neutral, is so entirely conclusive of the fact so decided, that it can never be controverted directly nor collaterally in any other court having concurrent jurisdiction.

JOHNSTON, *Justice*. The action below was instituted on a policy of insurance. On behalf of the insurers it was contended that the policy was forfeited by committing a breach of blockade. It has not and cannot be made a question that this is one of those acts which will exonerate the underwriters from their liability. The only point below was relative to the evidence upon which the commission of the act may be substantiated. A sentence of a *British* prize court in *Barbadoes* was given in evidence; by which it appeared that the vessel was condemned for attempting to commit a breach of blockade. It is the *English* doctrine, and the correct doctrine on the law of nations, that an attempt to commit a breach of blockade is a violation of the belligerent rights, and authorizes capture. This doctrine is not denied; but the plaintiff contends that he did not commit such an attempt, and the Court below permitted evidence to go to the jury, to disprove the fact on which the condemnation professes to proceed.

On this point I am of opinion that the Court below erred.

I do not think it necessary to go through the mass of learning on this subject, which has so often been brought to the notice of this Court, and particularly in the case of *Fitzsimmons*,

argued at this term. Nearly the whole of it will be found very well summed up, in the 28th chapter of Mr. *Park s* treatise.

The doctrine appears to me to rest upon three very obvious considerations: the propriety of leaving the cognizance of prize questions exclusively to courts of prize jurisdiction; the very great inconvenience, amounting nearly to an impossibility of fully investigating such cases in a court of common law; and the impropriety of revising the decisions of the maritime courts of other nations, whose jurisdiction is co-ordinate throughout the world.

It is sometimes contended, that this doctrine is novel, and that it takes its origin in an incorrect extension of the principle in *Hughes* v. *Cornelius*. I am induced to believe that it is coeval with the species of contract to which it is applied. Policies of insurance are known to have been brought into *England* from a country that acknowledged the civil law.

This must have been the law of policies, at the time when they were considered as contracts proper for the admiralty jurisdiction, and were submitted to the court of policies established in the reign of *Elizabeth*. It is probable, that at the time when the common law assumed to itself exclusive jurisdiction of the contracts of insurance, the rule was too much blended with the law of policies to have been dispensed with, had it even been inconsistent with common principles. But in fact, the common law had sufficient precedent for this rule, in its own received principles, relative to sentences of the civil law courts of *England*. It may be true, that there are no cases upon this subject, prior to that of *Hughes* v. *Cornelius*, but this does not disprove the existence of the doctrine. There can be little necessity for reporting decisions upon questions that cannot be controverted. Since the case of *Hughes* v. *Cornelius*, the doctrine has frequently been brought to the notice of the courts of *Great Britain* in insurance cases, but always with a view to contest its applicability to particular cases, or to restrict the general doctrine by exceptions; but the existence of the rule, or its applicability to actions on policies, is no where controverted.

I am of opinion, that the sentence of condemnation was conclusive evidence of the commission of the offence for which the vessel was condemned; and as that offence was one which vitiated the policy, the defendant ought to have had a verdict.

WASHINGTON, *Justice.* The single question in this case is, whether the sentence of the Admiralty Court at *Barbadoes*, condemning the brig *Fame* and her cargo, as prize, for an attempt to break the blockade of *Martinique*, is conclusive evidence against the insured to falsify his warranty of neutrality, notwithstanding the fact stated in the sentence as the ground of condemnation is negatived by the jury?

This question has long been at rest in *England.* The established law upon this subject in the courts of that country is, that the sentence of a foreign court of competent jurisdiction, condemning the property upon the ground that it was not neutral, is so entirely conclusive of the fact so decided, that it can never be controverted directly or collaterally in any other court having concurrent jurisdiction.

This doctrine seems to result from the application of a legal principle, which prevails in respect to domestic judgments, to the judgments and sentences of foreign courts.

It is a well established rule in *England*, that the judgment, sentence or decree of a court of exclusive jurisdiction directly upon the point may be given in evidence as conclusive between the same parties, *upon the same matter* coming incidentally in question in another court for a different purpose. It is not only conclusive of the *right*, which it establishes, but of the *fact* which it directly decides. This rule, when applied to the sentences of courts of admiralty, whether foreign or domestic, produces the doctrine which I am now considering upon the ground that all the world are parties in an admiralty cause. The proceedings are *in rem*, but any person having an interest in the property may interpose a claim, or may prosecute an appeal from the sentence. The insured is emphatically a party, and in every instance has an opportunity to controvert

the alleged grounds of condemnation, by proving if he can, the neutrality of the property. The master is his immediate agent, and he is also bound to act for the benefit of all concerned, so that in this respect he also represents the insurer.

That irregularities have sometimes taken place to the exclusion of a fair hearing of the parties, is not to be denied. But this furnishes no good reason against the adoption of a general rule. A spirit of comity has induced the Courts of *England* to presume that foreign tribunals, whether of prize or municipal jurisdiction, will act fairly, and will decide according to the laws which ought to govern them; and public convenience seems to require that a question which has once been fairly decided, should not be again litigated between the same parties, unless in a court of appellate jurisdiction.

The irregular and unjust decisions of the *French* Courts of Admiralty of late years, have induced even *English* Judges to doubt of the wisdom of the above doctrine in relation to foreign sentences, but which they have acknowledged to be too well established for *English* tribunals to shake; and the justice with which the same charge is made by all neutral nations against the *English*, as well as against the *French* Courts of Admiralty, during the same period, has led many *American* jurists to question the validity of the doctrine in the Courts of our own country. It is said to be a novel doctrine, lately sprung up, and acted upon as a rule of decision in the *English* Courts, since the period when *English* decisions have lost their weight of authority in the Courts of the *United States*. It is this position which I shall now examine, acknowledging that I do not hold myself bound by such decisions made since the revolution, although as evidence of what the law was prior to that period, I read and respect them.

The authority of the case of *Hughes* v. *Cornelius*, the earliest we meet with as to the conclusiveness of a foreign sentence, is admitted; but its application to a question arising under a warranty of neutrality, between the insurer and insured, is denied. It is true, that in that case, the only point expressly decided was, that the sentence was conclusive as to

the change of property affected by the condemnation. But it is obvious, that the point decided in that case depended not upon some new principle peculiar to the sentences of foreign courts, but upon the application of a general rule of law to such sentences. The case, as far as it goes, places a foreign sentence upon the same foundation as the sentence or decree of an *English* court acting upon the same subject; and we have seen that by the general rule of law, the latter, if conclusive at all, is so as *to the fact directly decided*, as well as the change of property produced by the establishment of the fact. Hence it would seem to follow, that if the sentence of a foreign court of admiralty be conclusive as to the property, it is equally conclusive of the matter of fact directly decided. What is the matter decided in the case under consideration? That the vessel was seized whilst attempting to break a blockade, in consequence of which she lost her neutral character; and the change of property, produced by the sentence of condemnation, is a consequence of the matter decided that she was in effect enemy's property. Can the parties to that sentence be bound by so much of it as works a loss of the property? Can the parties to that sentence be bound by so much of it as works a loss of the property, because it was declared to be enemy's property, and yet be left free to litigate anew, in some other form, the very point decided, from which this consequence flowed? Or, upon what just principle, let me ask, shall a party to a suit, who has once been heard, and whose rights have been decided by a competent tribunal, be permitted in another court of concurrent jurisdiction, and in a different form of action to litigate the same question and to take another chance for obtaining a different result?

I confess I am strongly inclined to think, that the case of *Hughes* v. *Cornelius* laid a strong foundation for the doctrine which was built upon it, and which for many years past has been established law in *England*. This opinion is given with the more confidence, when I find it sanctioned by the positive declarations of distinguished law characters; men, who are of all others, the best able to testify respecting the course of de-

cisions upon the doctrine I am examining, and the source from which it sprang.

In the case of *Lothian* v. *Henderson*, 3 *Bos.* and *Pull.* 499; Justice *Chambre*, speaking upon this point says, that the sentence of the *French* Court was in that case conclusive against the claim of the assured, "agreeably to all the decisions upon "the subject, beginning with the case of *Hughes* v. *Cornelius*, "(confirmed as that was by the opinion of Lord *Holt*, in two "subsequent cases,) and pursuing them down to the present "period. It is true," he observes, "that in *Hughes* v. *Cornelius* the question upon the foreign sentence arose in an action "of trover, and not in an action on a policy of assurance, where "the non-compliance with a warranty of neutrality is in dispute. "But from that period to the present, the doctrine there laid "down respecting foreign sentences has been considered equally "applicable to questions of warranty in actions on policies, as "to questions of property in actions of trover." *Le Blanc*, Justice, says, "That these sentences are admissible and conclusive "evidence of the fact they decide, it seems not safe now to "question: from the time of *Car.* 2. to this day, they have been "received as such without being questioned. In the discussion "of the nature of such evidence before the house in 1776, it "seems not to have been controverted; and the cases I may say "are numberless, and the property immense, which have been "determined on the conclusiveness of such evidence; in many of "which cases, the forms in which they came before the Courts "in *Westminster*-hall were such as to have enabled the parties, "if any doubt had been entertained, to have brought the question before a higher tribunal."

Laurence, Justice, also speaking of the legal effect of a foreign sentence upon this point, says, "as to which, after the continued practice which has taken place from the *earliest period*, "in which, in actions on policies of insurance, questions have "arisen on warranties, to admit such sentences in evidence, "not only as conclusive *in rem*, but also as conclusive of the "several matters they purport to decide directly, I apprehend "it is now too late to examine the practice of admitting them

"to the extent to which they have been received, supposing "that practice might upon the argument have appeared to have "been doubtful at first."

Rooke, Justice, Lord *Eldon*, and Lord *Alvanley*, all concur in giving the same testimony, that the doctrine under consideration had been established for a long period of years, by a long series of adjudications in the Courts of *Westminster*-hall.

I cite this case for no other purpose but to prove by the most respectable testimony, that the case of *Hughes* v. *Cornelius* decided in the reign of *Car.* 2. had by a uniform course of decisions from that time been considered as warranting the rule now so firmly established in *England.* And when the inquiry is, whether the application of the principle, laid down in that case to questions arising on warranties in actions on policies, be of ancient or modern date, I think I may safely rely upon the declarations of the *English* Judges when they concur in the evidence they give respecting the fact. It is true that no case was cited at the bar recognizing the application of the rule to questions between the insurer and insured prior to the revolution, except that of *Fernandez* v. *Da Costa*, which I admit was a *nisi prius* decision. But were I convinced that the long series of decisions upon this point, from the time of *Hughes* v. *Cornelius*, spoken of by the Judges in the case of *Lothian* v. *Henderson*, had been made at *nisi prius*, it would not in my mind weaken the authority of the doctrine. It would prove the sense of all the Judges of *England*, as well as of the bar, of the correctness and legal validity of the rule.

It is not to be supposed that if a doubt had existed respecting the law of those decisions, the point would not have been reserved for a more deliberate examination before some of the Courts of *Westminster*-hall. But the case of *Fernandez* v. *Da Costa* receives additional weight when it is recollected that the Judge who decided it was Lord *Mansfield*, and when upon examining it we find no intimation from him that there was any novelty at that day in the doctrine. To this strong evidence of the antiquity of the rule may be added that of Judge *Buller*, who

at the time he wrote his *Nisi Prius* considered it as then established.

That the doctrine was considered as perfectly fixed in the year 1781, is plainly to be inferred from the case of *Bernardi* and *Motteaux*, decided in that year. Lord *Mansfield* speaks of it as he would of any other well established principle of law, declaring in general terms that the sentence, as to that which is within it, is conclusive against all persons, and cannot be collaterally controverted in any other suit.

The only difficulty in that case was to discover the real ground upon which the foreign sentence proceeded, and the Court in that and many subsequent cases laid down certain principles auxiliary to the rule, for the purpose of ascertaining the real import of the sentence, in relation to the fact decided as between the insurer and the insured. For if the sentence did not proceed upon the ground of the property not being neutral, it of course concluded nothing against the insured, since upon no other ground could the sentence be said to falsify the warranty.

It was admitted by the counsel for the insured, that as between him and the insurer, the sentence is *prima facie* evidence of a non-compliance with the warranty. But if they are right in their arguments as to the inconclusiveness of the sentence, I would ask for the authority upon which the sentence can be considered as *prima facie* evidence. Certainly no case was referred to, and I have not met with one to warrant the position. If we look to general principles applicable to domestic judgments, they are opposed to it. We have seen that the judgment is conclusive between the same parties upon the same matter coming incidentally in question. The judgment of a foreign court is equally conclusive, except in the single instance where the party claiming the benefit of it applies to the court in *England* to enforce it; in which case only the judgment is *prima facie* evidence. But it is to be remarked that in such a case the judgment is no more conclusive as to the right it establishes, than as to the fact it decides. Now it is admitted, that the sentence

of a foreign court of admiralty is conclusive upon the right to the property in question; upon what principle then can it be *prima facie* evidence, if not conclusive upon the facts directly decided? A domestic judgment is not even *prima facie* evidence between those not parties to it, or those claiming under them; and such would clearly be the rule, and for a similar reason, as to foreign judgments. If between the same parties the former is conclusive as to the right and as to the facts decided, this principle, if applied at all to foreign sentences, which it certainly is, is either applicable throughout upon the ground that the parties are the same, or if not so, then by analogy to the rule applying to domestic judgments, the sentence cannot be evidence at all.

Upon the whole, I am clearly of opinion that the sentence of the Court of Admiralty at *Barbadoes* condemning the brig *Fame* and her cargo, as prize on account of an attempt to break the blockade of *Martinique*, is conclusive evidence in this case against the insured to falsify his warranty of neutrality.

If the injustice of the belligerent powers and of their courts should render this rule oppressive to the citizens of neutral nations, I can only say with the Judges who decided the case of *Hughes* v. *Cornelius*, let the government in its wisdom adopt the proper means to remedy the mischief; I hold the rules of law, when once firmly established, to be beyond the control of those who are merely to pronounce what the law is; and if from any circumstance it has become impolitic in a national point of view, it is for the nation to annul or modify it. Till this is done by the competent authority, I consider the rule to be inflexible.

Judges *Chase* and *Livingston* dissented, and Judge *Todd*, not having been present at the argument, gave no opinion; so that this judgment is reversed by the opinions of the Chief Justice, *Cushing*, *Washington* and *Johnson*.

None of the Judges except *Washington* and *Johnston* gave the reasons of their opinions.*

[*The Supreme Court of *New-York* have determined the following points:

1st. That where there is a warranty of neutral property, and a capture and condemnation as prize, it shall be presumed to be on the ground of enemy's property, and in all cases the sentence shall be conclusive:

2d. Where there is a condemnation for particular reasons mentioned in the sentence, the Court will not inquire whether the reasons were good or not, but the sentence shall be conclusive, both as to the law and the fact:

3d. Where the condemnation is, as being contraband, where there is the usual clause of warranty, against loss by trade in contraband, the Court will not inquire whether the article be contraband or not; the sentence shall be conclusive.

January 31, 1801.]

Supreme Court of the United States.

FEBRUARY TERM, 1808.

Marshal, Plaintiff in Error, *v.* The Delaware Insurance Company.

Error from the Circuit Court for the District of *Pennsylvania.*

INSURANCE—ABANDONMENT—TOTAL or PARTIAL LOSS. The real state of the loss, at the time when the abandonment is made, is the proper and safe criterion of the rights of the parties. When a final decree of restitution has been awarded, the technical loss ceases to be total, and the underwriter is only answerable for a partial loss.

THIS was an action on several policies of insurance, in which the following case was made for the opinion of the Court, with an agreement, that it should be considered as a special verdict, for the purposes of a writ of error.

The plaintiff, a citizen of the state of *New-York*, and residing in the city of *New-York*, by his agent, *F. Dusar*, on the 7th of *May*, 1806, caused insurance to be effected on the cargo, freight and brig *Rolla*, (all owned by him) *Samuel Clapp*, master.

On the 28th *May*, 1806, the vessel, while proceeding on her voyage, was captured and taken possession of, as prize, by the *French* privateer schooner, *Napoleon*, and carried into *Lemon*, an out-port of *Samana*. The captors there committed great pillage of the cargo. The *Rolla* remained at *Lemon* four or five days, and was then carried round to *Samana*, under the charge of a prize master, where further pillage was committed. The captors libelled the vessel and cargo in the inferior tribunal, at the city of *St. Domingo*, where the said vessel and cargo were acquitted on the 7th *July* by the said tribunal. From this decision there was an appeal by the captors to the superior tribunal at the said city of *St. Domingo*, where the said

vessel and cargo were again acquitted, and restitution awarded, on the 9th day of *July*.

" Restitution was actually made to the captain of the said brig *Rolla*, of the vessel, with the remainder of her cargo, on the 19th *July*, 1806, as appears by the proceedings of restitution.

" The said captain had a survey made, on the same day, to ascertain the loss and damage from pillage, &c. at the time and manner stated on the survey; and, on the 30th of *July*, proceeded on the voyage, originally intended to *St. Jago de Cuba*, where he arrived on the 6th of *August*. The remaining part of her cargo was there sold; and a part of the proceeds invested in a return cargo, which was sent by the *Rolla*, under the command of the mate, to *New-York;* and the rest of the proceeds was invested in bark, and brought home in the *Jane*, by the captain. The said return cargo arrived at *New-York*, on the 15th of *October*, 1806, and, on next day, the plaintiff wrote to his agent, *F. Dusar*, informing him thereof, and directing him to give the information to the insurers, which was accordingly done by the said *F. Dusar;* but the insurers refused to have any thing to do with the said property, or to give any directions as to the disposal of it. Whereupon the plaintiff sold the said property, for the account of the underwriters (but without their assent) except some bark, which yet remains in possession of the plaintiff unsold.

Intelligence of the capture was received at *New-York*, by the plaintiff on the 17th *July*, 1806; the plaintiff wrote a letter on the 18th of *July*, to his agent, *F. Dusar*, directing him to abandon the freight, vessel and cargo, to the insurers; which letter was received at *Philadelphia*, by the said *F. Dusar*, on the morning of the 19th of *July;* an abandonment was made to the insurers on the same morning, and a letter communicating the fact to the plaintiff was sent by the mail, which was closed at *Philadelphia*, at twelve o'clock of the same day."

Upon the documents referred to in the case, and making, by agreement, a part of it, these additional facts appeared: " That the same procès verbal which sets forth the act of restitution, also contained the particulars of the survey of the cargo;

that the notary and parties went on board of the brig *Rolla*, to make restitution at nine o'clock, on the morning of the 19th of *July;* and that the restitution, survey and proces verbal were concluded at one o'clock in the afternoon of the same day." It also appeared, " that the cargo was valued, in the policy at 22,500 dollars; that the proceeds of the sales of that part of the cargo, which was sold at *St. Jago de Cuba*, amounted to 17,018 dolls. 82 cts.; and that the gross value of the property pillaged or lost, (4833 dolls. 65 cts.) together with the expenses attending the capture, (about 1380 dolls.) amounted to 6263 dolls. 65 cts. which the underwriters were always willing to pay, as an average loss."

The question submitted to the court was, whether the plaintiff was entitled, in this case, to recover for a total, or only for a partial loss? And, after argument, *Washington*, Justice, gave judgment, in the Circuit Court, for the defendants, that they were only answerable for a partial loss; upon which the present writ of error was brought.

The cause was now argued by Messrs. *Ingersoll* and *Hopkinson*, for the plaintiffs in error; and by Messrs. *Rawle* and *Dallas*, for the defendants, upon these general grounds of inquiry, in fact, and in law: 1st. Whether, in point of fact, the act of restitution, or the act of abandonment was first completed? 2d. Whether in point of law, the peril of the captor ceased, and the vessel was in safety, when the decree of restitution was affirmed by the Court of Appeals, on the 9th of *July?* And 3d, Whether the actual state of the loss or the state of the information, at the time of abandonment is to determine the right to recover, in the present petition?

The opinion of the Court was delivered by *Marshall*, Chief Justice, in which it was expressly adjudged, first, " That the real state of the loss, at the time of the abandonment made, is the proper and safe criterion of the rights of the parties." And 2d, " That when a final decree of restitution (from which, it is admitted, no appeal lies) has been awarded, the peril is over; and the technical loss ceased to be total."

The judgment of the Circuit Court was accordingly affirmed.

Circuit Court of the United States.

PENNSYLVANIA DISTRICT.

APRIL SESSIONS, 1808.

Murray and Mumford *v.* Insurance Company of Pennsylvania.

INSURANCE. PARTIAL LOSS. ABANDONMENT. Where a vessel was insured by a valued policy at 6000 dollars, and there was a prior insurance for 4000 dollars, in the event of a partial loss, the assured was allowed to recover, on the second policy, an average loss and return premium on 2000 dollars; because, to that amount, the vessel was uncovered after the first insurance, and if property be undervalued in a policy, the merchant himself incurs the risk of the deficiency.

THE cause came on to be argued on the following facts:

The plaintiffs, on the 21st of *October*, 1803, effected insurance on the ship *Hope*, from *Gottenburg* to *New-York*, in the *New-York* insurance office, to the amount of four thousand dollars, valuing her at *four thousand dollars*.

On the 20th *December*, in the same year, they effected insurance on the same ship and voyage, to the amount of four thousand dollars, valuing her in that policy at *six thousand dollars*, in the office of the defendants, the insurance company of *Pennsylvania*.

At the time of effecting this last insurance, the defendants had no notice of the prior insurance effected at *New-York*.

The *real value* of the ship, when she sailed from *New-York*, exceeded six thousand dollars.

A partial loss took place by one of the perils insured against; and the plaintiffs settled with the *New-York* company, and received from them an average, calculated upon the four thousand dollars by them insured.

The parties to the present action referred it to three merchants, to ascertain the amount of average loss, and return premium due to the plaintiffs, if, in the opinion of the Court, on a case stated, the defendants should be adjudged liable at all upon the second policy.

The plaintiffs claimed before the referees an average loss on 2000 dollars, which they alleged to be uncovered by the first policy, amounting to 696 dollars 96 cents; and a return premium on the other 2000 dollars, (this being uncovered by the first insurance at *New-York*) amounting to 110 dollars; being together, 806 dollars 96 cents.

For that sum, with several years' interest, the referees reported in favour of the plaintiffs, amounting to 1003 dollars 85 cents, subject to the opinion of the Court on the question of law, Whether the defendants are liable on the last mentioned policy for the amount: or, Whether, by reason of the prior insurance at *New-York*, the same is absolutely void; in which case the defendants agreed they were bound to return the whole premium, with interest.

Both policies contain the usual printed clause, "That if the assured shall have made any other insurance upon the premises aforesaid, prior in date to this policy, then the said company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the premium hereby insured, and the said company to return the premium upon so much of the sum by them insured, as they shall be, by such prior assurance, exonerated from."

The case was argued on *Monday* the 25th of *April*, by Messrs. *Hallowell* and *Hare*, for the plaintiffs; and Messrs. *Rawle* and *Lewis*, for the defendants.

For the plaintiffs, it was insisted, that if the first policy had been *open*, and not valued, no doubt could arise as to the legal operation of these two insurances; the first would have been good for the amount subscribed, the second for two thousand dollars, (so much being uncovered by the first;) for the remaining two thousand dollars of the sum subscribed on the second policy, it would have been void, that being included in

the first; and upon this last two thousand dollars, a return premium would of course have been due to the plaintiffs; that the circumstance of the first being valued made no difference, *as between these parties;* the result therefore is the same, as if it had been open; it is agreed by the case stated, that the *real value* of the ship exceeded 6000 dollars, the valuation fixed by the defendants in their contract; of course in the first policy the ship was *undervalued*, and *Marshall* in his treatise on insurance, page 200, says, " If the property be *undervalued* in a policy, the merchant himself runs the risk of the deficiency." According to this doctrine, the plaintiffs, after the 21st of *October*, stood their own insurers for two thousand dollars; on 20th *December* following, they did not choose to continue so; and what was to prevent them from covering that sum, whenever they found it prudent, at a fair premium? or in other words, had they not an insurable interest left after effecting the first insurance? Doubtless they had. The only effect of the first valuation was to fix the amount *as between the parties to that contract* for their own convenience merely; it could effect no other persons. Here the defendants have bound themselves by *their own valuation* of six thousand dollars; they cannot recede from it, and it is admitted in the case to be consistent with the truth, as she was really worth that sum.

It is stated that the defendants were not informed of the prior insurance; it was unnecessary; no law requires it; no case calls for it; the very terms of the special clause, which has lately been introduced into the policies to prevent the operation of the rule of contribution amongst different sets of underwriters, necessarily imply that such communication cannot be made. In this case there was no fraud, no material concealment, no *over valuation;* and the plaintiffs, if they recover the sum reported, in addition to what they have received from the first insurers, will receive an *indemnity*, and no more; and where that only is sought for, and every thing is fair, these contracts of insurance should be liberally construed. The case is not affected by the prior valuation; it only operates on those who agree to it. As to the objection which may be urged, that in case of

total loss, the whole ship must have been abandoned to the first underwriters, and nothing would then be left to cede to the defendants; it is a sufficient answer to say, that the event has not occurred; a *partial loss* only has taken place, in which case there is no difference between a valued and an open policy; no abandonment has been made to either set of underwriters, or could be called for. If a total loss had happened, and the plaintiffs had actually made a cession of the whole ship to the insurers, then indeed there might be ground to urge that the policy now under consideration would have been *rendered void;* but the question before us is, whether it was void in its inception and creation. An event might occur where it might be the interest of the insured, situated as the plaintiffs are, to abandon on a total loss, to the second underwriters, and not resort to the first at all; as for instance, if the first should be insolvent. *Emer.* 275, and *Johnson's New-York Reports* vol. 1. p. 385,* were cited to show that a valuation was only conclusive between the parties, to the policy containing it.

For the defendants, it was urged that the first policy being *valued*, the second was absolutely void; the insured having deprived themselves of the power of ceding any part of the property to the defendants, inasmuch as the first underwriters would be entitled to total loss and abandonment to the whole; that as the defendants had no notice of the prior insurance when they subscribed their policy, they on that ground were discharged, it being a concealment of a material fact on the part of the plaintiffs. The cases of *M'Kim* against the *Phœnix Insurance Company* in this Court; and of *Yard's* Assignees against *Murgatroyd*, in the Supreme Court of *Pennsylvania*, were cited and relied upon by the defendant's counsel, as having decided principles which must govern this case, and terminate it in favour of the defendants; they went into a full examination of those cases, and comparison of them with the

[* Where a vessel was valued at two thousand dollars, and insured for that sum, and there was a prior insurance for three thousand dollars, the insured were allowed to prove that the vessel was worth enough to cover both policies. 1 *Johns. N. Y. T. R.* 385.]

with the present; they insisted also, and entered into arguments of considerable length, to prove that the plaintiffs were conclusively bound by the first valuation.

On the 26th, Judge *Washington* delivered the opinion of the Court as follows:

The case seems almost too plain to warrant an argument. The parties to this suit have agreed by the policy, on which the action is founded, that the property insured was worth six thousand dollars; and the defendants bound themselves to the extent of four thousand, the sum subscribed to cover so much of the agreed value as had not been covered by any prior insurance. It turns out that four thousand of that value had been previously insured in *New-York*. As to that sum therefore the defendants are not liable; but they would have been liable to that amount, had the agreed value of the property been eight thousand dollars, because so much of the value was uncovered by any prior policy. But as in the present case only 2000 dollars of the value was uninsured when the policy was effected, the defendants cannot be called upon for a sum exceeding that so left uncovered.

This is the plain import of the contract between these parties; and why should not the defendants comply with it? The reasons assigned are that the first policy being valued, the insured, in case of a total loss, must have abandoned the whole property saved to the first underwriters; and were thereby incapacitated to cede any thing to the defendants, without doing which they could not demand a total loss from the defendants; and that the omission to communicate to the defendants the existence of the first policy is such a concealment, as renders this policy void in its inception. In answer to these objections it is sufficient to say, that the plaintiffs do not claim a total loss; and in point of fact, if this were material, they have not abandoned to the *New-York* company. Claiming only a partial loss from these defendants, they are not entitled to an abandonment. It is not the incapacity or the failure to abandon which can defeat the right of the insured to recover, unless he goes for

a total loss. But if the law were otherwise, still the insured is not incapacitated to abandon to the second underwriters, until he has deprived himself of the power of doing so by having previously abandoned to some other underwriters. It was correctly observed by one of the plaintiffs' counsel that he might, if he chose, and sometimes it might be his interest to, abandon to the underwriters on the second policy, and take from them so much as such policy, from the terms of it, covered. It follows from these principles, that whether there was or was not a prior policy, was a circumstance of no consequence to the underwriters on the second, except as to the amount for which the latter, in case of loss might be liable; and therefore notice of such policy to them was unnecessary and idle. Besides, the very terms "in case the assured shall have made any prior assurance" imply that whether he has made such or not is a fact unknown to the underwriters on the second policy.

The case of *M'Kim* v. *Phœnix* company is, so far as it resembles the present, against the defendants. In that case the first policy was underwritten by the *Philadelphia* insurance company, to the amount of twelve thousand dollars, and was clearly open. The *Phœnix* insurance company afterwards underwrote fifteen thousand dollars on the return cargo of coffee, valuing the same at twenty cents per pound; and the question was, whether the plaintiff could recover any thing upon the latter policy, and if any thing, how much? The Court decided that the first policy covered as much of the coffee as twelve thousand dollars would absorb *at prime cost and charges*, instead of the value fixed on that article in the second policy, which of course would leave, to be covered by the second policy, as much less of the cargo, as the difference between the prime cost and charges and twenty two cents would amount to; and for so much of the cargo the *Phœnix* company was held to be answerable. The Court therefore decided that the subsequent agreement of the *Philadelphia* company, to waive all their right to the property which might be saved, could not change the nature of the contract entered into by the plaintiffs with the *Phœnix* insurance company; be-

cause at the moment it was made, no more of the cargo was insured but that which the first policy left uncovered, and was void as to so much as was so covered; if so, the subsequent agreement with the *Philadelphia* company, was, in relation to the *Phœnix* company, *res inter alios acta*, and could not affect the rights of the *Phœnix* company. The notice spoken of in that case was not in relation to the *existence* of a prior policy, but the nature and extent of it.

The case of *Yard's* Assignees v. *Murgatroyd* is very imperfectly stated, but it appears, so far as I understand, to resemble this as little as the one just noticed.

The opinion of the Court is, that the plaintiffs are entitled to recover the sum reported by the referees.

PENNSYLVANIA, 1807.

Commonwealth *v.* William Duane.

Habeas Corpus directed to the gaoler of *Philadelphia*, to bring the body of the defendant before the honourable *William Tilghman*, Chief Justice of the commonwealth.

Opinion of the honourable WILLIAM TILGHMAN, esquire, Chief Justice of the state of *Pennsylvania*, on the law respecting surety for good behaviour and of the peace.

IN *Pennsylvania*, a party charged with the publication of a libel may be bound in a recognizance for his appearance at the next Mayor's Court. There are occasions in which it may be proper and necessary to insist upon surety for good behaviour, but as a general rule, it ought not to be demanded before conviction.

THIS case comes before me in consequence of a *habeas corpus*, directed to the gaoler of the city and county of *Philadelphia*, commanding him to bring before me the body of *William Duane*, together with the cause of his being imprisoned. The gaoler, in obedience to the writ, has produced the body of *William Duane*, and returned that he was detained in prison, by virtue of a warrant of commitment from the Mayor of *Philadelphia*. This warrant recites, that *William Duane* had been charged on the complaint of the Marquis de Casa *Yrujo*, made through the attorney general, and on the oath of *William B. Hight*, with having on the 19th and 21st of *July* last, in a public newspaper called the *Aurora* or *General Advertiser*, edited by the said *William Duane*, published certain libels on the said Marquis, and that the said *William Duane* had been required by the said Mayor, to enter into a recognizance, as well for his appearance at the next Mayor's Court, as for his good behaviour in the mean time, which he had refused to

do; and contains a commitment of *William Duane* until he shall enter into a recognizance as aforesaid, or be delivered by due course of law.

From an examination that has been had before me, it also appears that the said *William Duane* offered, before the Mayor, to enter into a recognizance for his appearance, but refused to enter into one for his good behaviour. So that the only question for my determination is, whether it is proper to insist on recognizance for the good behaviour of *William Duane*, between this time and the next Mayor's Court.

In the consideration of this point, are involved principles of importance, which have agitated the feelings and divided the judgments of many persons both in this and other states of the union.

I have considered it, certainly without passion or prejudice, and with as much attention as the short time allowed for decision would admit.

Surety for good behaviour may be considered in two points of view. It is either required after conviction of some indictable offence, in which case it forms part of the judgment of the Court, and is founded on a power incident to courts of record, by the common law; or it is demanded by judges or justices of the peace, out of court, before the trial of the person charged with an offence, in pursuance of authority derived from a statute, made in the thirty-fourth year of *Ed.* 3. It is this last kind of surety we are now to consider. The *stat.* 34 *Ed.* 3. authorizes justices of the peace to take surety for good behaviour of all those that are *not of good fame*, to the intent that the public may not be troubled by such persons. It is supposed that this statute was made to prevent the disorders which were introduced by the soldiers of *Edward* 3., numbers of whom, after serving in his armies in *France*, were discharged in *England*. The natural meaning of the words "persons not of good fame" seems to be, those who by their general evil course and habits of life had acquired a bad reputation, and were supposed to be dangerous to the community. In process of time, however, the construction of these

expressions has been extended, far beyond their original meaning; and persons are now commonly held to find surety for their good behaviour, who are not generally of ill fame, but have only been charged with some particular offence. It is laid down by some ancient authors, that libellers may be held to surety for good behaviour. But on searching the *English* books of reports, I find but few cases, in which courts have given their opinion on this point. The decisions of the *English* courts prior to our revolution are, with some exceptions, received as authority in our courts. Now it appears from the cases before the revolution, that it was by no means an established practice, that a man charged with a libel, should, before conviction, be held to surety for his good behaviour. In the case of the *King* v. *Shuckburg*, in the year 1743, reported 1 *Wils.* 29. the defendant was arrested, by virtue of a warrant from the secretary of state, for publishing a blasphemous libel called Old *England's* Te Deum. Upon being brought up to the Court of King's Bench, by *habeas corpus*, in order to be bailed, he offered to enter into the common recognizance for his appearance. The attorney general insisted on bail for his good behaviour also. The Lord Chief Justice said, it had often been taken both ways, and he intended to take the opinion of all the Judges; he therefore, for the present, took the defendant's recognizance for his appearance only, and made him enter into a rule, to put in bail for his good behaviour if the major part of the Judges should be of opinion that he ought. Nothing further appears to have been done in this case; in a marginal note of the report of it by sergeant *Wilson*, is mentioned the case of the *King* v. *Franklin*, 5 *Geo.* 2. when the same point was argued before all the Judges, but they never gave any opinion. Mr. *Heighmore*, in his treatise on bail, published in the year 1783, cites the case of the *King* v. *Shuckburg* and seems to consider the law as still unsettled. It appears from these authorities that the *English* Judges were unwilling to establish a practice, which they might have thought hostile to the genius and spirit of the nation.

Let us now examine how this matter has been considered

in *America*. The *United States*, in general, have at all times been very much alive to the liberty of the press and the right of trial by jury; and their constitutions have shown great jealousy and sensibility on these points. In prosecutions of libels against the king and officers of government, it has been usual in *England*, to prosecute by way of information; a mode of proceeding, by which the defendant is brought to his trial by a petty jury, at the instance of the attorney general, without the previous inquiry by the grand jury. The constitution of *Pennsylvania* has taken special care to guard against this. Grand juries are not to be dispensed with, except in certain enumerated cases, of which libel is not one. It also provides, that every citizen may freely speak, write and print, on every subject, being responsible for the abuse of that liberty. I think that the counsel for Mr. *Duane* has gone too far, in contending that our constitution absolutely prohibits the binding a man to his good behaviour for a libel before conviction. It only provides, that a man may freely speak, write and print, at his own peril, being responsible either to the public, or any individual whom he may injure. It is generally understood, and I think truly, that this provision was intended to prevent men's writings from being subject to the previous examination and control of an officer appointed by the government, as is the practice in many parts of *Europe*, and was once the practice in *England:* now, a man, though bound to his good behaviour, may still publish what he pleases, and if he publish nothing unlawful, his recognizance will not be forfeited. Indeed, I consider this point as having been decided by the Supreme Court, and ultimately by the High Court of Errors and Appeals, in the case of the *Commonwealth* v. *Cobbett*, which I shall consider more particularly presently. But although it has been decided, that a recognizance, when thus taken, is not void, yet it never has been decided within my knowledge, that it is incumbent on a Judge, or that it is prudent or proper, to call for surety of good behaviour from a person charged with a libel, before trial; and that is the point now before me. Indeed from the charge delivered by Chief Justice *Shippen* in *Cobbett's* case, of which

my brother Judge *Smith* has favoured me with a very accurate note, I should not suppose, that the Chief Justice or either of the other Judges would have thought it proper to call for this kind of surety, except under very extraordinary circumstances. The case now before me is attended with no extraordinary circumstance, so far as it has come to my knowledge judicially; and I must confine myself to the evidence produced. The Mayor, who was so obliging as to favour me with an account of what passed at his office, declared, that he considered the security for good behaviour as a thing quite of course, and for that reason only would not dispense with it. And he also declared, that he prepared the recognizance himself, in what he conceived the usual form, without the instruction or direction of the attorney general.

Now if this practice be established, two consequences will follow, which certainly may be attended with great inconvenience. In the first place, the Justice who takes the recognizance may fix it in whatever sum he pleases; and then if it should be forfeited by a libel of the mildest nature, the whole penalty must be recovered, without any power in the Court to mitigate the punishment, according to the nature of the offence. And in the second place, the defendant may be brought to trial for a libel, so far as to be burthened with the forfeiture of his recognizance, without the previous investigation of a grand jury. No considerate man will say, that under certain circumstances, these may not be very great evils. No man can exactly calculate how far a practice of this kind, exercised by wicked and daring hands, into which it may sometimes fall, may stifle or even extinguish the spirit of honest investigation and necessary inquiry. And what is the occasion for it? The party complaining has a right to the protection of the laws, and will receive it. The person accused will be brought to his trial, and if convicted, he will be punished according to the degree of the offence. What more does public justice require? But it is said, it is necessary to prevent future libels; if future libels are published, while the prosecution is depending, they will be punished on conviction, in proportion to the obstinacy of the

offender. No man abhors more than I do, the base practice of libelling. It is a crime forbidden by the laws of God and man, and of a much blacker dye than many men seem to be aware of. All classes and descriptions of men, all parties have in their turn lamented and suffered by the uncontrolled licentiousness of the press. I am not without hopes that the evil will be lessened; that a remedy may be found, in the honesty and good sense of a majority of the people, aided by the wholesome chastisement which courts and juries will be called on from time to time to inflict. But in order to give those punishments their full efficacy in the community, it will be necessary in judicial proceedings to temper firmness with liberality, never forgetting that humane principle, which, in doubtful cases, turns the scale in favour of the accused. I should have felt little difficulty in deciding the question before me, but for the case of *William Cobbett*, cited by the attorney general in his argument. Mr. *Cobbett* was, in the year 1797, bound with two sureties, in a recognizance for his good behaviour, by the Chief Justice and present Governor *M'Kean*, whose opinion has great weight with me, because I consider him as an eminent lawyer, zealously attached to the liberties of this country both civil and religious. I have not been able to obtain an accurate statement of the case of *Cobbett*, so far as relates to the binding of him to his good behaviour. Judge *Smith's* notes only contain an account of the action on the recognizance tried in the Supreme Court. As far however as I have heard, it differs from the present case, in some material circumstances. I have never seen the warrant against *Cobbett*, but I have been informed, that he was charged in it, with numerous libels against different persons, of which, on his appearance before the Chief Justice, he avowed himself the author. In the present case, *Duane* is charged with publishing two libels, against the same person, and he has not confessed that he is the author of either. As a Judge, I know nothing that is not legally proved before me. I must not act on the supposition, that the defendant has published numerous libels, because there is no oath to that purpose; and by our constitution, all warrants must be grounded upon an

oath or affirmation. Upon the whole, the most that can be said with regard to recognizances for good behaviour, is, that they are demandable or not, at the discretion of the Judge. They differ from recognizances to keep the peace in two important features: 1. Surety for good behaviour is more extensive in its nature than surety for the peace, and may be more easily forfeited, and, therefore, should be exacted with greater caution. 2. Surety of the peace is demandable of right, by any individual who thinks himself in danger of bodily hurt, and will make the necessary oaths; but this principle has not been applied to surety for good behaviour. I will not say, that there are no circumstances, in which surety for good behaviour ought to be exacted in cases of libels, before conviction; on the contrary, I have no doubt but there are occasions, on which it may be proper and necessary to insist on it. But I am of opinion that it will be most agreeable to the spirit of our constitution, and most conducive to the suppression of libels, to adopt it as a general rule, not to demand surety for good behaviour before conviction. Under these impressions, I must discharge the defendant, on his entering into a recognizance for his appearance at the next Mayor's Court.

Philadelphia County, Common Pleas.

JANUARY, 1808.

Day *v.* Jarvis.

Action on the case to *September* term, 1805. Plaintiff declares for goods sold and *quantum valebant*

A JURY being called and duly impaneled, the plaintiff's counsel proceeded to open his case.

It appeared that the parties were both print-sellers; the plaintiff residing in *Philadelphia*, the defendant in *New York;* that in ———, the plaintiff having published a large number of engravings of president "*Jefferson*" proposed an exchange with the defendant, for *Heath's* engravings of "*Washington;*" that the "*Jeffersons*" were intended to match the "*Washingtons!*" and the subscription for each was the same, five dollars and twenty-five cents a piece; with a customary allowance of twenty-five per cent. to the trade: that the defendant, consenting to the exchange, the plaintiff had in good faith sent him fifty "*Jeffersons*," expecting to receive fifty "*Washingtons*," in return: that some time having elapsed, and the "*Washingtons*" not arriving, the plaintiff pressed the defendant to perform his contract; but *Jarvis* replied, that it was unreasonable to require it; for that "*Jefferson*" himself had already lost so much of his popularity, and was sinking so rapidly, that his likenesses (*which of course were depreciated with the original*) had already fallen to almost nothing; and as there was no chance of HIS ever being re-elected, there was no probability of THEIR ever rising: that the "*Washingtons*" on the contrary, were always saleable, and never fluctuated in value, *but were likely to rise in public estimation;* and satisfying himself with this excuse for the breach of his contract, he obstinately persisted in refusing to give more than twenty-five "*Washingtons*" for the fifty "*Jeffersons:*" that the twenty-five "*Washingtons*," had been received; and this action was brought for the value of the remaining twenty-five "*Jeffersons*," agreeably to the terms of the contract.

The defendant's counsel denied the contract set up on the other side, although he admitted the receipt of the fifty "*Jeffersons.*" He lamented that the absence of his client prevented him from fully demonstrating the injustice and extravagance of this pretended contract, by proving that, whatever the artist might have intended, the "*Jeffersons*" were never considered matches for "*Washingtons*," by any persons of the least taste or judgment: that although a few of the "*Jeffersons*" were put off, at the subscription price, soon after publication, and had a tolerable brisk sale, yet that the moment they were submitted to the test of criticism, and were compared with the "*Washingtons*," they were condemned by the unbiassed judgment of the public, and fell, as he was able to prove by a deposition, which he held in his hand (but which being *ex parte*, he was not permitted to read) to twelve and thirteen cents a-piece, by wholesale, and at that price *were a dull article;* and that to him it appeared monstrous that when the plaintiff had found a ready sale, and received a full price for the twenty-five "*Washingtons*," exceeding the value of all the "*Jeffersons*," that were ever turned from his plate, he should at this time come forward, and demand the same price for his "*Jeffersons*," which began to depreciate before they were dry from the press, and were now *of less value than waste paper.*

The plaintiff's counsel insisted *totis viribus* upon his contract. He did not pretend to deny the terrible depreciation of the "*Jeffersons*," but his client was a print-seller, and did not mean to speculate upon the continuance of the popularity of his PRINT or its LIKENESS: his object was, to turn the one to good account while the other was in public favour; and if the defendant had made a bad bargain, he had himself alone to blame for it.

It appeared in the course of the evidence, that the plaintiff had offered to receive "*Hamiltons*," in lieu of *Washingtons*," but the defendant declined giving either of them for the "*Jeffersons*," alleging that the "*Washingtons*," were of increasing value, and daily rising in public estimation.

Verdict for the plaintiff. Damages one hundred and eighteen dollars and twelve cents.

Court of Quarter Sessions.

PHILADELPHIA COUNTY.

Commonwealth *v.* Naglee.

ASSAULT AND BATTERY. The following animated sketch of a very extraordinary case of assault and battery, which was recently tried in the Court of Quarter Sessions for the city and county of *Philadelphia*, is eagerly seized upon by the Editor. It is not inserted as evidence of the law of assaults in that state; but it is preserved as an honourable characteristic of the temper of the times. It proves that how much soever the citizens of this country may be deceived and deluded by the artful insinuations of ambitious demagogues or the specious promises of weak and wicked statesmen, they still cherish those feelings which illustrate and dignify the patriotism of a nation. The accuracy of this report may be relied on.

A CASE occurred on *Monday* in the Court of Quarter Sessions, which excited some amusement, and considerable satisfaction. *Italy* and *Switzerland* and *Holland* and *Portugal* and *Spain* have all, all fallen before the power of *Napoleon;* and it is now our turn to present a rich repast to the maw of this devourer of empires. The blow, which was aimed, has been arrested by the spirit and the nerve of an *American* jury. *Bonaparte* has now an occasion furnished to him, which should afford him serious reflection; and if his reasoning be cool and correct, he will find that *America* is not to be subdued, while such feelings and sentiments, as the discussion of *Monday* produced, glow in the bosoms of our countrymen.

In the fall of the year 1806, a *Swedish* schooner with a cargo of considerable value, both owned by a *Swedish* subject, and under the care of Mr. *John Naglee*, an *American* supercargo, sailed from this port for the isle of *Cuba*. In the voyage

she was captured by the privateer *Dolphin*, commanded by Captain *Brouvard*. This is the man whose vessel, which lately entered the port of *Philadelphia*, and under the pretence of wanting provisions and repairs for a *long cruise*, was furnished by our government with those articles which the embargo laws *prevent our own citizens from carrying to each other*.

When Captain *Brouvard* captured the schooner, the usual scenes of outrage and atrocity were committed, which in this age of the "*freedom of the seas*," accompany all *French* captures. Pistols and swords and sabres were exhibited to alarm the fears of the crew and to show the power of *Frenchmen*. The schooner was then plundered and sent to *Barracoa*, a port in the island of *Cuba*. Here a new scene of plunder occurred, and before any proceedings were instituted to procure the condemnation of the vessel, one half of the cargo was smuggled on shore, as well to avoid the restoration of it in case of an acquittal, as to defraud the government of the duties. An attempt was made by Captain *Brouvard*, with the aid of a file of soldiers, to seize and imprison the supercargo, who, finding his life in danger, applied to the governor of the port, who was a *Spaniard*, and who immediately interfered to rescue Mr. *Naglee* from the fangs of the *Frenchman*. The schooner was then ordered to the city of *St. Domingo*, where she soon after arrived. Mr. *Naglee*, apprehensive of his life, if he went in the schooner, took his passage in another vessel; and at great expense and with considerable difficulty, followed her; but not in sufficient time to save his property. Before he arrived, his vessel and cargo were delivered up to *Brouvard*, and his only solicitude was to provide for his return to his home.

Brouvard had robbed him of a pair of pistols, which it was his wish to regain, and for which purpose he applied to him but without success. He then made an application to general *Ferrand*, who commanded at the city of *St. Domingo*, and *Brouvard* was ordered by him to restore the pistols. After some time they were returned to Mr. *Naglee;* but the case in which they were contained, was cut and defaced, the locks of

the pistols were broken, and the barrels *filled with slush!* But such as they were, they were the remnant of his property, and he found himself now reduced by the villany of *Brouvard*, from a state of comfort to that of beggary. He smarted under a sense of his wrongs, and when he was about to leave *St. Domingo*, on his return to *Philadelphia*, he seized an occasion to say to *Brouvard*, "I am now in your power, and must submit "to it; but if I ever catch you in any part of the *United States* "*except Christ Church*, I will have my revenge."

Two years elapsed, and the time for revenge arrived: *Brouvard* entered the port of *Philadelphia* a short time since, after having plundered an *American* vessel at sea, and occasioned the death of a respectable passenger, Mr. *Campbell* and three or four of the crew. Here, his vessel was directed to be repaired; and by the *orders of our government*, an unnecessary quantity of provisions was furnished to him, while, *at the same time*, and *by the same orders*, the citizens were prohibited from receiving from their sister states even a barrel of flour! While the schooner was repairing at the ship yard, *Brouvard*, accompanied by the *French* vice-consul and a *Frenchman*, and dressed in his uniform, went to inspect her. They were met in the street by Mr. *Naglee*, who, addressing himself to *Brouvard*, said, "How do you do, sir?" *Brouvard* replied, "Very well, sir, I thank you." "I suppose," said Mr. *Naglee*, "you do not remember me." "*Oh, oui, très bien; je suis ravi de vous voir!*" said *Brouvard* and held out his hands as if to greet him. *Naglee* instantly seized them in his left hand, and proceeded to take his promised revenge. He struck *Brouvard* several severe blows, when the vice-consul interfered, either as a peace-maker, or as a partisan of *Brouvard*. His own testimony was, that he interposed in the former capacity, and laid a gentle hand upon each, for the purpose of parting them; and in this statement he was strengthened by the oath of the *Frenchman* who accompanied him and *Brouvard*. The witnesses for *Naglee*, however, had another story to tell. They swore that the vice-consul seized *Naglee alone* violently by the collar. This latter story, it is presumed, was the impression of *Naglee*, for

finding himself attacked from behind, he took the precaution of extending *Brouvard* on the ground, *by one honest blow*, and then turned to defend himself from his assailant. Not much, however, was necessary for this purpose. He gave the great *Napoleon's* vice-consul, one blow on the stomach, and the vice-consul fell.

" O! what a fall was there, *my countrymen!*" Having thus *defended* himself from *an assault*, he proceeded to perform the promise which he had made to *Brouvard* at *St. Domingo*, which he executed to his own satisfaction, and we hope to the satisfaction of his countrymen. After *Brouvard* had been beaten a second time, his epaulettes covered with dust, and his tremendous cockade ingloriously thrown from his head, he recollected that he had a dirk and a sword, which he had on a former occasion held to the breast of Mr. *Naglee*, and which at that time answered his end. He thought he would try it again, and laid his hand on his dirk. *Naglee* seized a small piece of a hoop-pole, and threatened to use it, unless *Brouvard* instantly sheathed his dirk. The captain thought " the better part of valour was discretion," and quietly obeyed; and (as *Naglee* expressed it in his testimony) " with the vice-" consul, immediately *ran away* to a neighbouring house." *Brouvard*, however, was not satisfied with this mode of taking revenge, and immediately proceeded to *wipe away* the stain from his honour and his *cockade*. He complained to Monsieur *Turreau*. *Turreau* complained to the government. The government instructed Mr. *Dallas*, the district attorney, and Mr. *Dallas* complained to the grand jury for the county of *Philadelphia*, who found two bills of indictment against *John Naglee:* one, for assaulting and beating the vice-consul, the other, for assaulting and beating Captain *Brouvard*. The charges were alleged to be " against the peace and dignity of the commonwealth of *Pennsylvania*," and " in defiance and contravention of a treaty made between the *United States* and *Napoleon, Emperor of France, King of Italy, &c.*"

Naglee confessed the charge of assaulting and beating *Captain Brouvard* (as, in truth, it could not well be denied) and

submitted his story to the Court. He pleaded *not guilty* to the charge of beating the vice-consul; and this indictment was tried on *Monday* by twelve jurors, who *are indeed Americans!*

Mr. *Dallas*, the district attorney, opened the prosecution, by declaring that *it was instituted by the orders of the government.* He spoke of the mighty power of *Bonaparte*, of the savage disposition of *Frenchmen* in acts of retaliation; and said, that if *Naglee* was acquitted, our citizens would be at the mercy of the *French*, whom they should meet on the ocean. He said, that if there was a verdict of acquittal, the *French* emperor would not be *satisfied with it;* and he instanced as an example, the decision in the affair of *Pearce*, in which our government was not satisfied with the acquittal of captain *Whitby*. He attempted to show the *privileges* of the vice-consul and of Captain *Brouvard;* and said they were protected from violence by the law of nations, and by treaty. He said that the vice-consul's story was true, and that *Naglee's* witnesses were not to be believed. He concluded by telling the jury, that "he hoped they would give such a verdict that *our government* "*would hear no more of it!*"

Mr. *Bradford* then opened on the part of the defendant, and gave a brief recital of the acts of provocation which he had suffered from *Brouvard*, at and after the capture of his vessel. Mr. *Hopkinson* followed on the same side in a speech of some length and great eloquence. He spoke as an *American*, feeling for the honour of his country. He adverted, in an animated strain, to the terrors which the district attorney had held out to influence the decision of the jury. He said he hoped we were not yet prepared to offer ourselves up to the grasp of the great *Napoleon;* he trusted our courts of law were yet independent. He admitted the *privileges* of vice-consuls, but was not prepared to admit a privilege in them to assault an *American* citizen. He said he hoped the jury would give a verdict of acquittal, and there could be no doubt, that whatever might be the dissatisfaction of the *French* emperor, that *our country* would sanction their verdict, and unite with them to meet the consequences.

It is, however, impossible to give a correct idea of the genius and eloquence of Mr. *Hopkinson's* speech, or of the effect it produced on the audience. We wish it had been preserved. We wish our countrymen to see it. We wish *Napoleon* himself could have heard it. It was decisive upon the jury. Mr. *Dallas* endeavoured in his conclusion to break the force of it; but his attempt was vain. It was addressed to the feelings and to the understandings, to the heads and hearts of *Americans;* and the result was honourable to themselves and to their country.

They acquitted Mr. *Naglee*, and *ordered the vice-consul to pay the costs of the prosecution.*

Embargo. Injunction.

IN THE

SUPERIOR COURT IN INQUIRY,

BEFORE JUDGE CHARLTON.

Exparte. Paul Grimball, complainant.

EMBARGO. INJUNCTION. An injunction is a prohibitory writ, restraining a person from committing or doing a thing which appears to be against equity and conscience.

An injunction granted by the Superior Court of *Georgia* to stay sales under an execution, because in consequence of an embargo imposed by the general government, no price could be obtained for the property.

THIS was a bill in equity, stating, that several judgments had been obtained at law against the complainant (*Paul Grimball*) for nearly 5000 dolls. while he had a judgment in his favour for 8000 dolls. suspended by an appeal; that executions had been issued against him, and a sale threatened, which if it took place, would prove ruinous to the complainant, inasmuch as nearly double the property would be sacrificed now, at a forced sale, which it would have required only four months ago to pay these judgments; and praying an injunction to delay any further proceedings at law for the present.

The case was argued on the seventh instant; *Leake*, the complainant's solicitor, stated, that the bill sought relief on two grounds:

1st. Equity will relieve on grounds of public utility or convenience:

Because a national measure [the embargo acts] ought not to produce individual ruin, when this Court can prevent it.

2d. Equity ought to relieve, from the peculiar situation of the party.

Because the complainant was deprived at law of a rightful advantage.

Lawson and *Stiles*, for plaintiffs in execution, opposed the injunction principally on the ground, that it could not issue from the apprehensions of the party; that no levy or sale was yet ordered; and that the complainant ought to give security before the relief prayed for, could be obtained.

Upon which, his Honour pronounced the following decree:

The complainant in this bill states, that executions have been issued against his property, and a levy and sale menaced; that if a sale is made by the sheriff, at this time, when the pecuniary embarrassments occasioned by the embargo acts are so general and distressing, it will involve him in ruin, as no price, or no fair price can be obtained for his property, and that he has no other means of paying his debts.

Upon these grounds, he applies to the chancery side of this court, for the writ of injunction to restrain a sale under these executions. I shall not bottom a decision upon the peculiar circumstances of *this case* only, or as a particular case, involving such features of hardships and oppression, as render necessary the interposition of this branch of the Court. On the contrary, I shall view this as a case in which *all our citizens* are interested, and as calculated to establish a precedent for the general benefit.

I ask the question; is it not against *equity and conscience?* is it not in the highest degree oppressive, to compel the sheriff to obey the mandate of a writ of execution, when the facts are before the whole public, that the sale of produce, in its usual course of traffic is suspended, or bought up by monied men, from the necessitous planter for a song? From the planter, who must *sacrifice* his crops to prevent a *greater sacrifice;* who must sell to obtain provisions (if a cotton planter) for his negroes, and necessaries for his family; who must sell for this song, to prevent his negroes (a more valuable property, and upon whose uninterrupted labour and increase, the future support of himself

and children depend) being knocked off under the hammer of the sheriff, at a price far less than one half their cash value. Is this picture overcharged? Is it not rather a correct delineation of the distresses of the agricultural interest at this moment? If it is, then relief ought somewhere to be found.

It has been, and is at this hour, a subject of sufficient magnitude, to require one of the extraordinary meetings of the legislature, which the constitution authorizes. But, until a legislative, suspension of sales is given to the people, cannot relief be afforded by this court?

I have given to the powers with which the law and the constitution have invested me their full deliberation: and though I do not possess all the powers of a Lord Chancellor, because by our local system the interposition of a jury is required in equity cases, yet that system cannot, and does not interfere with these matters in chancery, which in their nature must be exclusively referred to the discretion of the Court. Of this nature, I consider the application for the writs of injunction.

AN INJUNCTION *is a prohibitory writ restraining a person from committing or doing a thing which appears to be against equity and conscience.*

This is the simple definition given by one of the elementary compilers, and it is sufficiently comprehensive for me to adopt it.

The principal use made of this writ is, to restrain some rigorous proceedings at law.

I shall then consider whether a sale by the sheriff, at this crisis of our national affairs, big with calamities, as I have described, to the agricultural interest, should be restrained as a rigorous proceeding at law, and as a proceeding against equity and conscience.

1st. Is it a rigorous proceeding in law? an execution is the last stage of our common law proceedings. It places the person, or the property of the defendant, at the mercy of the judgment of the creditor, who may make his election. I am speaking of the execution, of which nothing can be alleged in chancery against its parent judgment. Of this nature are the executions before us; and they assume the appellation of ri-

gorous proceeding, because there is no remedy at law; and unless a remedy is found somewhere, *ruin* stares the defendant in the face; a ruin not brought on himself by a want of probity, or of property in his possession exceeding, probably ten times, at a cash valuation, the amount contained in the executions, but a ruin brought down upon him by a *necessary measure* of the national legislature and government, which unfortunately obstructed the channels through which he had been accustomed to pay his debts, probably with punctuality.

2d. Is it a proceeding against equity and conscience?

This is the broad basis of the writ of injunction.

It is admitted by both sides, that no remedy can be had at common law. When we resort to law, it is expected that *precedents* will have their full weight of authority; and though precedents may militate with that justice which the peculiar circumstances of a particular case may require, yet, for the sake of general and uniform rules, a judge will seldom deviate from an established and settled principle to accommodate the circumstances of one case, however strong the reasons may be to exempt it from the operation of precedent.

In the case of *Doe* v. *Pott*, 2 *Dougl.* 120, Lord *Mansfield* is reported to have said, "the absurdity of Lord *Lincoln's* case is "shocking; however, it is now law." This observation of his lordship may be selected as the most strongly illustrative of the authority, given by common law judges, to precedent.

A court of inquiry is not so trammeled. It is governed by uniform rules of evidence, and a respect is evinced in that jurisdiction for precedents, yet they are seldom permitted to stand in the way of the particular circumstances of each case.

A lord chancellor of *Great Britain* is almost as omnipotent as parliament. Give him but a strong hold on an equitable principle, and he will be sure to substitute the *intention* of an act of parliament for its *letter;* he will push aside precedent for abstract honesty. What are the many cases in the equity reports, on the statutes of frauds and perjuries, but indirect repeals of the plain and literal requisites of that all-important statute?

It is only necessary to advert to the nature of law and equity to account for the latitude of power given to the latter.

The *law* is stubborn and unbending. It marks out for itself a course from which no fascinations can allure, no obstacles impede.

It neither looks to the right nor to the left. It neither relents nor forgives. It issues its mandates, and will be obeyed. It takes into view no consequences.

Fiat justitia is its maxim, whether contemplating its operation upon a nation or upon an individual.

We perceive at once, that such should be the nature and effects of law; they necessarily result from that indiscriminating and eternal justice, upon which the common law is founded.

Our ancestors felt, as we have felt after them, the necessity of some tribunal, armed with the attribute of alleviating the inexorableness of the law. This tribunal is called a court of equity, whose decisions are guided by the particular circumstances of each case.

This court of equity lends mercy to the law, and steps in as a kind of mediator between rigid justice, as established by the artificial institutions of society, and that justice which traces its origin to the laws of nature and of God.

In cases like these before me, the law places every thing at your disposal. It holds out to you the means of rioting upon the spoils of your neighbour, your debtor or the community.

The nation, in order to redress itself for outrages on its sacred rights, imposes distresses on its own citizens. These distresses are the deprivation of those means which heretofore poured wealth or competence into the lap of the planter.

His ostensible wealth is, however, now the same. He shows you his cotton, his rice and his negroes. He proves to you that his property has even greatly accumulated since he engaged to pay you your debt; but to pay that debt *now*, he tells you he is unable, unless a sale is directed by the sheriff, the consequence of which would be a payment to you of four fold; for a sale of his property now would amount to a diminution of quadruple its intrinsic and just value, and in that ratio less than it would have sold for at market previous to the embargo.

How immense, and at the same time how unrighteous, are the advantages which the creditor derives, if he himself become the purchaser, and pay with his judgment! How much more unrighteous and against conscience is a purchase under these circumstances by a capitalist, who with his ready money speculates upon the misery and the ruin of the unfortunate debtor!

Time has not been allowed me to search for apposite cases in the books. I do not recollect, at this moment, any cases reported in the *English* authorities involving the principles of the cases before us.

I shall therefore bottom my decision upon the abstract grounds, that cases of this description involve hardship and oppression; that they are against equity and conscience; that they are promotive of injury to the public; that they enable monied men to accumulate usurious wealth; and that they tend to convert a *just* and *salutary* measure of the government into an engine of political disaffection, through the medium of distressed and persecuted debtors.

Let the writ of injunction therefore issue, to stay *sales* upon these executions, until the first day of *September* next, the complainant depositing with the sheriff, when required, to meet the day of sale, sufficient property, the valuation of which to be ascertained by the price at market three months preceding the embargo act.

SUPERIOR COURT, April 8th, 1808.

Georgia, Chatham county. In Equity, Exparte R. M. Maxwell.

THIS case standing upon the same footing as the above, it is ordered that a writ of injunction be granted to stay sales upon executions mentioned in the bill, until the first day of *September* next; the complainant depositing with the sheriff, when required, to meet the day of sale, sufficient property, the valuation of which to be ascertained by the market price three months preceding the embargo act.

Court of King's Bench.

HILARY TERM 1770.

Perrin *v.* Blake.

THE note of the present case is particularly valuable, both on account of the importance of the doctrine which is involved in the decision, and the comprehensive view which Mr. *Cooke* has given of the arguments of the Judges.

The history of the proceedings in this case is given by *Douglass*, p. 329. *in note.*

An ejectment was brought in *Jamaica*, where the estate lay, and a special verdict found, which came over for the opinion of the privy council, upon an appeal in the nature of a writ of error. Lord *Mansfield*, (the only law lord who then attended the council) knowing the several opinions which had been taken, and considering the question as a point of general tendency, which might affect titles to real property in *England*, was unwilling that judgment should be given in the cockpit merely on his opinion; and therefore proposed, with the consent and concurrence of the counsel on both sides, that the appeal should be adjourned, and in the mean time, a solemn opinion taken in *Westminster-Hall.* At first it was agreed to state a case for the opinion of the court of B. R. which might have been adjourned on account of difficulty in the exchequer chamber; but a case from the king in his judicial capacity being new,* it was afterwards thought better that the point should be brought before the court upon the pleadings in a feigned action of trespass. *Walker*, sergeant, settled the record for that purpose, on which, to a declaration in trespass (laid in *Middlesex* under a *videlicet*) the defendant *pleaded* the will. The plaintiff *replied* the recovery, on the ground that the son took an estate tail, and to this replication the defendant *demurred.* After a writ of error had been brought in the House of Lords, from the judgment of reversal

* It is understood that the *master of the rolls* cannot send a case to any of the courts of law, and therefore, when *he* wishes to take their opinion, the practice is to direct a feigned action or issue, so as that the question of law may arise upon the finding of the jury.

in the *Exchequer Chamber*, and had depended for a considerable time, the parties compromised the dispute, and the plaintiff petitioned for leave to non-pross his writ of error, which was granted, as appeareth from the entry in the Lords' journal, [7th *May*, 1777] &c.

It may not be amiss to add from the same authority, the observations of *Buller*, Justice, upon this case.

"But the question, whether the intention be consistent with the rules of law, can never arise till it is settled what the intention was. This can only be discovered by taking the whole will together. If it be apparent, I know of no case that says, a strict legal construction, or a technical sense of any words whatever, shall prevail against it; unless a case which made a great noise in *Westminster* a few years ago, be considered as such.* I have no difficulty in saying that I do not look upon that case as such, nor if ever a similar case should arise, shall I think myself bound by it, but shall consider the question as if that question never had existed; for the most that can be said of it, is, that as far as it repects any rule of law, there were the opinions of six Judges against six.† I am aware, that, as to the decision of the case between the parties there were the opinions of seven against five. But it will be found that the opinion of one of the seven‡ went upon the idea, that it did not appear, that the testator meant to use the technical words in a different sense from what the law in general imposes upon them." *Doug.* 327.

THIS case came before the Court upon an appeal from the judgment of the Supreme Court in the island of *Jamaica*. It was argued three times in King's Bench, and, after time taken for consideration by the Judges, they severally gave their opinions this term. The following were the circumstances: The testator devised to his daughters, *Bonetta*, *Hannah* and

* *Perrin* v. *Blake*, *B. R. H.* 10 *Geo.* 3. *Cam. Scacc. H.* 12 *Geo.* 3. 4 *Burr.* 2579, 2581. 2 *Blackst.* 674.

† Lord *Mansfield*, *Aston* Justice, and *Willes* Justice, in *B. R.* and *De Grey* Chief Justice, *Smythe* Baron and *Blackstone* Justice, against *Yates* Justice, in *B. R.* and *Parker* Chief Baron, *Adams* Baron, *Gould* Justice, *Perrot* Baron and *Nares* Justice.

‡ *Blackstone* Justice, Vide 4 *Burr.* 2581 The account there given of the substance of Mr. *J. Blackstone's* opinion was furnished by himself.

Ann, the sum of two thousand pounds each, provided they should attain the age of twenty-one, or marriage, "which ever shall first happen, and should my wife be ensient with child, if a female two thousand pounds, and if a male, I give and bequeath my estate real and personal, equally to be divided between the said infant and my son *John* [*William**] when the said child shall attain the age of twenty-one. It is my intent and meaning that *none of my children should sell and* [*or**] *dispose of any of my estate* for *longer* [*time**] *than his life;* and *to that intent* I give all the rest and residue of my estate to my son *John* and the said infant, *for and during the term of their natural lives*, the remainder to my brother *Isaac* and his heirs for and during the natural lives of my son *John* and the said infant, the remainder to *the heirs of the body of my said sons*, *lawfully begotten or to be begotten*, remainder to my daughters equally to be divided between them, remainder to my said brother during the lives of my said daughters respectively, remainder to the heirs of the body of my said daughters equally to be divided between them, and I declare it to be my will, if my daughters happen to die immediately, their respective shares shall vest in the heirs of her body so dying."

This was a case of great expectation and as Lord *Mansfield*, *Aston* and *Willes* were of the same opinion, I have thrown their arguments together in order to avoid prolixity.

They said that points of this nature were often agitated, and from the uncertainty of the law of devises and the variety of opinions which appeared in the books, it was rather to be lamented than wondered at. In every commercial country, property should be as much unclogged as possible, and this maxim has prevailed particularly in this country. The liberality of judges, in admitting the fiction of common recoveries to take place, defeated, in effect, the statute of *Westminster de donis* and the direct tendency of the statute of *fines*. The 32 *H.* 8. of *Wills*, and the 12 *Car.* 2. which abolished the feudal tenures, was to unfetter estates. And though it is ad-

* Fearne.

mitted that in deeds, *donationes sunt stricti juris* yet, in wills, in order to favour and encourage, as much as possible, the inclinations and endeavours of men to dispose of their property, a greater latitude of construction is adopted, for the intention of the testator governs the construction. The rule of law is laid down in *Burr.* 1112. that if the intention can be collected, by considering all the parts of the will, it shall be carried into effect, if it be not inconsistent with some fundamental principle or rule of law. This is as well the voice of reason and humanity as of law.

In this case there are two points:

I. Whether the testator meant to give *John*, the son, but an estate for life, or in tail.

II. Whether, if he meant to give him but an estate for life, his intention shall overrule the legal import of the technical terms which he has used.

1. *As to the first point.*

Nothing can be more clear than that the testator meant to give *John*, the son, but an estate for life. There are cases to show that the words, for life *et non aliter*, for life and no longer, and for life only, are sufficient to manifest the intention of the testator, and will prevent the ancestor from taking the inheritance, though there be an estate for life given to him, and a subsequent limitation, in the same instrument, to his heirs, heirs of his body, or issue. In this case, much stronger words are used to declare the intention of the testator to be, to give to *John*, the son, but an estate for life. For he gives to him, *during his natural life*, declares his intention to be that he shall not alien for a longer time than his life, and between the estate given to him, and the limitation to the heirs of his body, he creates an estate to his brother and his heirs, during the life of *John*, the son, which must be intended to be for the support and preservation of the contingent remainders limited to the heirs of his body. In short, the intention of the testator could not be more clear, if he had used the strongest negative words, or if he had said that *John*, the son, should have an estate for life only, and that the heirs of his body, should take as purchasers.

2. *As to the second point.*

We think that the apparent intention should overrule the legal import of the technical terms. The law will not suffer a testator to create a perpetuity, nor to limit a fee upon a fee, because they are against the policy of the law; but where a testator has expressed an intention, not repugnant to the rules or policy of the law, but has made use of improper or inadequate words, the law, which considers testators as *in extremis*, and *inops consilii*, will supply all defects, and carry the intention as fully into execution, as if he had employed the most apt, legal terms. Nothing can prevent a testator's meaning from taking effect, but its repugnance to some principle or rule of law. The intention, in this case, is perfectly agreeable to the rules of law and he might, with the greatest ease, have created an estate for life only, in *John*, the son, and an estate tail in the heirs of his body by purchase. Such estates are made every day. The words, *heirs*, *heirs of the body*, and *issue*, are frequently words of purchase, and though they are commonly words of limitation, when an estate is limited to them in the same instrument, in which an estate of freehold is given to the ancestor, yet they may, by the intention of a testator, be turned into words of purchase. And this appears from the cases of *James* v. *Richardson*, 1 *Vent.* 334. *Long* v. *Beaumont*, *Newcome* v. *Barkham*, 2 *Vent.* 729. *Shaw* v. *Weigh*, 2 *Stra.* 832. *White* v. *Collins*, *Comyns* 289. *Peacock* v. *Spooner*, 2 *Vern.* 195. *Read* v. *Snell*, 2 *Atk.* 646. *Mandeville's* Case in *Co. Litt.* 26[b]. *Bagshaw* v. *Spencer*, *Mich.* 1748, *in Chan.* *King* v. *Melling*, 1 *Vent.* 229. *Clerke* v. *Day*, *Moore* 523. *Loddington* v. *Kyne*, 1 *Sal.* 224. *Law* v. *Davy*, 2 *Stra.* 849. *Lowe* v. *Davis*, 2 *Ab. Eq.* 316. *Long* v. *Lanning*, *Burr.* 1100. *Archer's* case, 1 *Co.* 63.

It cannot be said, that the determination in *Archer's* case, was because the limitation was to the heir male in the singular number, for it appears in the case of *King* v. *Melling*, in *Ventris*, that *heir male* is *nomen collectivum*, and in a will is equivalent to *heirs* in the plural number. The true reason, of the determination in *Archer's* case, was, that the words of limita-

tion superadded, might have some effect. It cannot be argued that the cases cited to show that *issue* may be a word of purchase, after the limitation of a freehold to the ancestor, are in point; for *issue* is equivalent to *heirs of the body*, and is so considered in the statute, *West.* 2. *de donis*, and in the case of *King* v. *Melling*. Neither can it be said, that the cases cited from the chancery books are distinguished from the case before us, under a notion of a distinction between legal estates and trusts. Though the distinction has been taken in some of the books, it seems to be groundless. The courts of equity are as much bound by positive rules and maxims concerning property, as the courts of law are. The rule, that if a freehold is limited to the ancestor, and afterwards in the same instrument, there is a limitation to his heirs, or heirs of his body, that the ancestor shall take the inheritance, binds trusts as well as legal estates. *Garth* v. *Baldwin* 1755, *in Chan. Long* v. *Lanning*, *Burr.* 1100. Trusts and legal estates are governed by the same rules; and the rules of construction in the courts of law and equity are the same. *Watts* v. *Ball*, 1 *P. Wms.* 109. *Banks* v. *Sutton*, 2 *P. Wms.* 700. *Bale* v. *Coleman*, 1 *P. Wms.* 142. It is true that Lord *Hardwicke*, in the case *Bagshaw* v. *Spencer*, did adopt the distinction, but he did it to avoid expressly overruling the certificate of the Judges, in the case of *Coleson* v. *Coleson*, as their opinion in that case was founded upon the distinction. He did not agree with them, but thought their opinion against law; and in the case of *Bagshaw* v. *Spencer*, he expressed himself thus of *Coleson* v. *Coleson*. *If that case be law.* Besides, one of the last things which his Lordship did, was to send a case similar to that of *Coleson* v. *Coleson*, for the opinion of this court, which shows that he was dissatisfied.

In the case of *Lisle* v. *Grey*, *T. Jon.* 114. 2 *Lev.* 223. *Poll.* 582, the Court determined, that the ancestor should take but an estate for life, though there was a subsequent limitation to the heirs of his body; and the like determination was made in the case of *Walker* v. *Snowe*, *Palm.* 359. Both these were cases of deeds and at law. Now, if the intention shall over-

rule the legal import of technical terms, in deeds which are donatives *stricti juris*, *a fortiori*, shall it in wills, which admit of more liberal rules of construction. In the case of *Conton* v. *Holyard*, an estate for ninety-nine years was construed to be *for ninety-nine years, if he so long lived*, because that appeared to be the intention of the party. In the case of *Backhouse* v. *Wells*, 1 *Eq. Ab.* 184. a devise was to the ancestor *for life only*, without impeachment of waste, and after his death to the issue male of his body, and the ancestor was held to take but an estate for life. In that case the greatest stress was laid on the word *only*, because it was declaratory of the intention of the testator. In the case of *King* v. *Welling*, the words, *issue of his body*, were held to be words of purchase, though there were no negative words, and no estate to trustees to produce contingent remainders; and in *Roll.* 839, where there was a devise to *A.* for life, *et non aliter*, and after his decease to the sons of his body, the ancestor was held to take no more than an estate for life.

No unexceptionable authorities can be adduced, to warrant a determination by us, that *John*, the son, took an estate-tail. There never was a judgment given that the ancestor should take the inheritance, where the intention of the testator was apparently against it, as it is in the present case. There is no authority to prove that the intention of a testator, appearing from other parts of the will, may not make the devise be construed into strict settlement, though it be to the ancestor for life, with a remainder to the heirs of his body, &c.

As for the rule in *Shelley's* case, 1 *Co.* 65^{b}. that the ancestor shall take the inheritance, whenever an estate of freehold is given to him, and in the same instrument there is a limitation to his heirs, or the heirs of his body, it is only a *dictum*, a case put *arguendo*. Besides, *Shelley's* case was a case of a deed, and it is not said that the rule would hold strictly in the case of a will, nor that the legal import of such limitations may not be qualified or altered by other explanatory words. If it be confined to deeds, it is a good rule.

Again, that rule derived its origin from the feudal policy, and was introduced to prevent the lord from losing the fruits of the feudal tenures, such as wardship, relief and marriage. But these tenures are now abolished, and therefore, the reason of the rule having ceased, the rule should cease likewise; especially as it is a very inconvenient one, and repugnant to the spirit of that liberal maxim, *cujus est dare ejus est disponere.*

In the case of *Langley* and *Baldwin*, 1 *Eq. Ab.* 185. the Court determined that the ancestor took an estate tail, to effectuate the primary intention of the testator; for the limitation was to the first, and so on to the sixth son, and if the ancestor had not taken the inheritance, the seventh and other sons would have been excluded. The case of *Coleson* v. *Coleson*, 2 *Stra.* 1125, is not much to be depended on, because it was doubted by so great a man as Lord *Hardwicke.* [But Lord *Mansfield* said if a case should happen exactly the same as *Coleson* v. *Coleson*, he should think himself bound by that case, for that it was protected by age, and was the foundation of many conveyances.] And though the *dictum* in *Shelley's* case is, in a manner affirmed, in the case of *Robinson* v. *Robinson*, *Burr.* 38. the affirmance of it was immaterial to the point in question. The case depended upon its own circumstances, and the Court determined it, as they did, in order to effectuate the manifest *general* intention of the testator; and as that was the case, the certificate of the Judges in *Robinson* v. *Robinson* does not affect the case of *Backhouse* v. *Wells.* [It was said by Lord *Mansfield* that *he* desired the certificate in the case of *Robinson* v. *Robinson* might be penned in such a manner as not to shake *Backhouse* v. *Wells.*]

In the case of *Sayer* v. *Masternan* it is not denied but that where the intention is clear, the court may overrule the legal import of technical terms. In that case the intention was not clear, but *in equilibrio*, and therefore the ancestor was construed to take the inheritance according to the rule laid down by Lord Chief Justice *Wilmot* in the case of *Dogson* v. *Grew*, 2 *Wils.* 322. that where the intention is clear it shall govern the construction, but where it is doubtful the legal import of

the terms used shall prevail. Cases should never be cited but to prove the general rules of interpretation, unless the devise in the case cited be *in totidem verbis* with the case to which it is applied, and this can very rarely happen.

Upon the whole, they were of opinion that *John*, the son, took no more than an estate for life under the devise.

Mr. Justice *Yates*. I am always sorry to differ in sentiments from the rest of the Court, especially as, considering the abilities of those with whom I do not coincide, in all probability I am mistaken. But if I be in an error, I am excusable, because, although I have taken the greatest pains, I have not been able to discover it. It is the duty of every Judge to be *nullius addictus jurare in verba magistri;* and upon every occasion, to speak his sentiments freely. Therefore, how diffident soever I may be of my own opinion, such as it is, I am bound to declare it.

It is my opinion, admitting that it was clearly the intention of the testator to give *John*, the son, but an estate for life, that he took an estate tail. But it is said that these legal rules, in cases of wills, relax, and give way to the intention of the testator, which alone governs the construction, and that therefore, in the present case, *John*, the son, shall take but an estate for life. It is to be observed that this is the case of a legal estate, that there is no executory trust; and therefore it is not to be considered what estate a court of chancery would have directed a trustee to convey if this had been a trust estate. For, in the cases of trusts, though the intention does direct the construction, no rule of law is shaken. In all devises of legal estates, though it is a general rule that the intention shall govern, yet it is circumscribed and controlled by other great and invariable rules of construction, and it would be better to defeat the manifest intentions of a thousand testators than carry them into effect at the expense of rendering any of the fundamental laws of property uncertain and unsettled. One of them is, as it is laid down in *Shelley's* case, that whenever the ancestor takes an estate of freehold, and in the same instrument

there is a limitation to his heirs, or the heirs of his body, the ancestor shall take the inheritance, and the words, *heirs* or *heirs of his body*, shall be considered as words of limitation only. Entire limitations come not under the predicament of improper or inaccurate expressions, and however we may be allowed to assist the latter, we cannot, in many instances meddle with the former without doing an injury to the established rules of property.

In the present devise, legal language is used, a legal limitation is made, to which the law has affixed an unalterable construction, which no man's will can control, and therefore the intention cannot operate. It is not a consequence of the abolition of the feudal tenures, that those rules which are of feudal origin have ceased to be rules. It would be a great misfortune if such were the consequence, for to the feudal law we are indebted for the noble uniformity and firmness of the laws of *England*. But exclusive of feudal considerations, the rule in *Shelley's* case is a good one. During the life of the ancestor he can have no heir: his heirs are included within himself; and he must take whatever is limited to his heirs, after such a limitation of a freehold to himself, as being, as it were, limited to a part of himself. Heirs, in *Shelley's* case, are not spoken of abstractedly; it is not said that they must be always words of limitation, but only where there are two limitations, the first of the freehold to the ancestor, and the second of the inheritance to the heirs; and therefore the cases in which there is no precedent freehold in the ancestor are foreign to the purpose, as *Mandeville's case*, *Co. Lit.* 26^{b}. and the case of *Newcomer* v. *Barkham*, 2 *Vern.* 729. which was moreover the case of a trust. In not one of the cases at law that have been cited is there such a general limitation to the *heirs*, or *heirs of the body* and no more, after a freehold given to the ancestor: for in the cases of *Long* v. *Lanning*, *Law* v. *Davis*, *Clark* v. *Day*, *Archer's case*, and the rest, there are words of limitation superadded, and the heirs are determined to take by purchase in order that those superadded words may have some effect. Therefore those cases are clearly distinguishable from the present case where

there are no such words superadded. Neither is the present like to the cases where the limitation is to the *issue*. Issue is an ambiguous term. The law has not affixed any invariable construction to it, and there it operates as a word either of limitation or purchase, according to the intention. For this reason, in the cases of *Lodington* v. *Kine*, *King* v. *Melling*, and *Backhouse* v. *Wells*, *issue* was construed to be a word of purchase. But if, in the case of *Backhouse* v. *Wells*, the expression *heirs of the body* had been used instead of *issue*, the ancestor would have taken the inheritance notwithstanding the manifest intention of the testator was against it.

As for the cases of *terms*, as *Peacock* v. *Spooner* and *Read* v. *Snell*, they are entirely foreign, for to them the rule of construction which governs the present case cannot be applied. There can be no freehold in the ancestor; and if the heirs take at all, they must take by purchase, because a chattel is not descendible. The cases of *trusts* are by no means similar, there is no freehold in the ancestor, and therefore the rule of law is not affected, though *heirs* be construed as a word of purchase. The rule, in the cases of legal estates, operates by its own inherent authoritative weight; but in the cases of trusts, though it may be adopted by analogy, it has no such inherent authoritative weight. When it is once settled that, from necessity, a certain construction must be put upon the words used, it is in vain to talk of intention: for, though the strongest negative words that can be conceived had been employed to express the intention, they would have no weight. As for the restrictions of alienations, they are incompatible with the estate given, and void.

In the case of *Robinson* v. *Robinson*, an estate was given to the ancestor for life *and no longer*. Now nothing could have denoted the intention of the testator more strongly than the words, *and no longer;* and yet, because there was a subsequent limitation to the heirs of his body, the court held that the ancestor should take the inheritance. They were right, for they were not at liberty to reject the construction, which the law has annexed to all devises of this nature, and construe the will according to the intention of the testator. When this

case of *Robinson* v. *Robinson* came up, by appeal, before the House of Lords, they asked the opinion of the Judges, which was delivered by Lord Chief Baron *Parker;* and it is remarkable that he, in delivering the opinion, said that if an estate was devised to the father for life, remainder, to heirs male of his body, the father would take an estate tail; for that the rule of law was, as it is laid down in *Shelley's* case. In *Coleson* v. *Coleson*, where the intention of the testator, that the first taker should have but an estate for life, is more strongly expressed than in the present case, the Court was of opinion that he should take an estate tail, because there was a subsequent limitation to the heirs of his body, and expressly held that where *an estate for* life is *given to the ancestor, and in the same instrument a limitation* is *made to his heirs*, or *heirs of his body, the heir cannot be a purchaser;* and in *Papillon* v. *Voice*, 2 *P. Wms.* 471. Lord *King* adopted the rule of law in his decree, and said the breaking through it would occasion the utmost uncertainty.

Where the expression is ambiguous, the intention will, as has been said, fix it either one way or the other. In 1 *Rol. Ab.* 837. an estate was devised to a man for life, remainder to the sons of his body lawfully begotten. Now, *sons* is a word *prima facie* of limitation, but nevertheless ambiguous, and therefore, as the manifest intention was that it should be a word of purchase, it was held to be a word of purchase.

I lay it down as an universal position, that in cases of legal estates, to vest an estate in the heirs of the body by purchase, after the limitation of a freehold to the ancestor: 1st. They must be described in such a manner, as to make a *designatio personæ:* and 2d. There must be superadded words of limitations to the heirs of their bodies &c. These are two necessary ingredients. And it is immaterial whether the conveyance be by deed, or by will.

As to the estate given to a trustee to preserve the remainder limited to the heirs of the body of *John*, the son, it is merely supposed. No trust is mentioned, and an express devise cannot be controlled by implication. But even supposing it intended for that purpose, it was an idle and inefficient trust, for

John, the son, had the inheritance, and the intervening estate could do no more than prevent an immediate consolidation of the freehold and inheritance.

To prove the cases cited from the chancery books is foreign, it will be necessary to show that the distinction, before hinted at, between trusts and legal estates has been adopted by chancellors and is warranted by the best authorities. In *Papillon* v. *Voice*, where the case was that a sum of money was devised to purchase lands to be settled on *B.* for life without impeachment of waste, remainder to the trustees &c. to support contingent remainders, remainder to the heirs of the body of *B.* with power to *B.* to make a jointure; and by the same will land was devised to *B.* for life without impeachment of waste, remainder to trustees &c. to the heirs of the body of *B.* Lord *King*, on an appeal from the Master of the Rolls, expressly took the diversity and decreed that, in the first instance, *B.* should take an estate for life only, and in the second an estate tail. In *Coleson* v. *Coleson* the diversity was taken. In *Bagshaw* v. *Spencer*, Lord *Hardwicke* took it, allowing that a devise of a legal estate must be governed by legal rules; and he said that as it was the case of a trust, the court would carry the intention into execution, and were not bound by the rules of law that prevail on the construction of devises of legal estates. In *Leonard* v. the Earl of *Sussex*, 2 *Vern.* 526. the decree was expressly grounded upon this diversity: and it was allowed by the Lord Keeper in *Legate* v. *Sewell*, 2 *Vern.* 551. To the same point are *Broughton* v. *Laugley*, 2 *Lutw.* 814. 2 *Salk.* 679, and *Glenorkie* v. *Boswell*, *Forres.*

There is an argument against this diversity between trusts and legal estates, which at the first blush appears to be material; and that is drawn from the absurdity that would follow a resolution, that two courts having concurrent jurisdiction should adopt different rules of property. But upon considering the matter, it will appear to be without foundation, for the rule of law is not restrained to one court in particular, but it is applied to the cases of legal estates in particular; and in all such cases, the courts of equity are as much bound by it as the courts of law. Besides in the cases of trusts, there is no concurrent jurisdiction, for as to them the courts of law have no jurisdiction at all. When a testator de-

vises a legal estate, he makes a final, conclusive conveyance; and therefore all that can be done is to consider what estates are created by the terms which he has made use of. But in trusts there is no such final conveyance. There is, in fact, no conveyance at all, but an executory direction, by which a subsequent conveyance is to be made or framed, under the inspection of the Court of Chancery, more in the nature of directions given to a conveyancer, to frame a conveyance by, than any thing else; and therefore, though the directions given by the testator are vague, the Court of Chancery will take care that apt words shall be used in the conveyance. Even in the Court of Chancery, there is a distinction between trusts executed, where the testator mentions the particular term of the limitations to be made, and trusts executory, where he only gives general directions, and leaves it to the trustees to form the limitations. In the former instance, the Court of Chancery sometimes determines by analogy to the rules of construction affixed to legal estates, though it has been said, in the cases of trusts, they have no inherent, authoritative weight, but in the latter, the intention is the sole rule of construction.

If the rules of property should be broken, endless confusion would follow. In such circumstances, no lawyer could give an opinion with certainty nor direct a conveyance with confidence. As men could not purchase with security, they would not purchase at all; and all those evils would arise, which are ever to be dreaded from a stagnation of property. Besides, if the rule in *Shelley's* case be shaken, all the conveyances whose stability depends upon it (of which I have been told there are innumerable) must fall to the ground.

This is a devise of a legal estate: it must be construed by legal rules, and therefore I am of opinion, that *John*, the son, took an estate tail.

The opinion of the other Judges being that *John*, the son, took an estate for life only, judgment was entered accordingly.

There was an appeal to the Exchequer Chamber before all the Judges and the judgment of the Court of King's Bench was reversed, and an appeal to the House of Lords where it was settled without argument.

Baltimore County Court.

EJECTMENT, MARCH TERM, 1808.

William M'Mechin's Lessee *v.* George Grundy and Joseph Thornburgh, Assignees of Aquilla Brown, Bankrupt.

UNDER the late act *to establish an uniform system of bankruptcy throughout the United States* (vol. 5. p. 45. L. U. S.) all deeds which are made with a view to give a preference to any creditor in exclusion of others, or to delay or defraud any of them in the recovery of their debts, are fraudulent in point of law, and are acts of bankruptcy.

The *denial* to the sheriff who is endeavouring to arrest a party, is not an act of bankruptcy, if the debt upon which the writ issued was not at the time actually due; but the adjudication of the commissioners of bankrupts, that the party is bankrupt, may be supported by other acts of bankruptcy than that upon which the commission is founded, provided they were committed within six months before the commission was issued.

NICHOLSON, *Chief Justice.** The defendants are assignees of *Aquilla Brown* a bankrupt, and the plaintiff claims under a deed made by the bankrupt on the 20th *February* 1802.

On that day a writ issued against *Brown*, at the suit of *Nicholas Norris* for the recovery of a debt due to him, upon which writ *Brown* was not taken, but ordered himself to be denied to the sheriff's officer. The denial was considered by *Norris* as an act of bankruptcy, and he, accordingly, on the same day, preferred a petition to the district Judge, praying a commission of bankruptcy to issue against *Brown*, and proved his debt to the satisfaction of the Judge. On the 22d, a commission did accordingly issue, and on the 23d, the commis-

* Abs: Hollingsworth and Jones.

sioners declared *Brown* a bankrupt, and made an assignment of his effects to the defendants as assignees. It is alleged by the plaintiff that the debt to *Norris* was not payable when the writ issued, and that therefore the denial to the sheriff was not an act of bankruptcy; and it assuredly was not, if the jury should be of opinion that the writ was taken out before the day of payment had arrived.

To support the commission, however, and the declaration of the commissioners, other acts of bankruptcy are insisted on. The first of these was the conveyance to *James Clarke* of two vessels on the 17th of *February*, 1802, made by *Brown* for the purpose of securing *Clarke* on account of sundry pecuniary engagements which *Clarke* had entered into for him. It is stated and proved, that on the 16th of *February*, *Brown* called on *Clarke* to request him to indorse a bill of exchange for *Brown's* accommodation, which he peremptorily refused to do: upon which *Brown* declared that he could not go on if *Clarke* refused to assist him, and that he was ruined. *Clarke* persisted in his refusal, and inquired of *Brown* how he (*Clarke*) was to be secured for sundry engagements of a similar nature, which he had already entered into for *Brown's* use. *Brown* then made an offer of the vessels to secure *Clarke*, and not to uphold, nor to procure an extension of his own credit. It was not to procure any assistance which would enable him to proceed in his business, and was not therefore either for his own benefit or for the benefit of his creditors generally, but with a view to give *Clarke* a preference. It was in fact taking the amount secured by the transfer of the two vessels out of the general mass of his property to give it to one creditor in exclusion of all the others, when he well knew that he could not satisfy the just demands of all; and it was accompanied with no circumstances whatsoever, which, in a legal view are considered as furnishing a justification. It was not the payment of a debt in the ordinary course of business; there was no threat nor pressure by *Clarke* of an extraordinary nature, but a mere common place question, after *Brown* had declared himself ruined, of how he (*Clarke*) was to be secured, not for

a debt already due by *Brown* to *Clarke*, and which *Clarke* had a right to demand, but for debts of *Brown's* to other persons, for which *Clarke* supposed he should eventually be responsible. If therefore the jury should be of opinion that the deeds to *Clarke*, or to either of the other creditors, were made with a view to give a preference to some of the creditors in exclusion of the others, or to delay or defraud any of them in the recovery of their debts, the deeds were fraudulent in point of law, and do amount to an act of bankruptcy; and though *Brown's* denying himself to the sheriff might not have been an act of bankruptcy, because that *Norris's* debt was not payable when the writ issued, or because of any preconcert between *Norris* and *Brown*, yet other acts of bankruptcy committed within six months previous to issuing the commission, will support the commission and the adjudication of the commissioners that *Brown* was a bankrupt.

If the jury should be of opinion, that the deeds, or any of them, were made in contemptation of bankruptcy with a view to secure certain creditors in exclusion of others, such deed so made is void as against the assignees, and the act of making it, is an act of bankruptcy.

It is urged that the peculiar circumstances, under which the deed to Mr. *M'Mechin* was made, excepts it out of the general rule which has been before laid down. I should have felt very great satisfaction, if I could have formed such an opinion, but with all my inclinations, the best judgment which I can form leads to a contrary decision. The Messrs. *Pleasants* had previously been *Brown's* indorsers to a considerable amount, and on the 29th of *December*, 1801, he applied to them to lend him their names again. This they refused to do unless he would point out some fund from which they could be secured. He engaged to secure them by promising to deposit in their hands bank stock to meet any loss they might incur on his account. Whether he had such an amount of bank stock, at the time does not appear; but it was their duty, if they relied on that kind of security, to have it completed. This they did not do, but lent their names for 14,000 dollars more, resting them-

selves on his promise only. It is *possible* that if he had possessed bank stock at the time of his bankruptcy, they might have been entitled to a preference in the disposition of that particular fund, as they had his written engagement to give it to them in security, or if he had transferred stock to them on the 20th of *February*, in pursuance of his engagement, it might possibly have been sustained. But the question, as it now presents itself, is of a different nature. The house and lot in dispute were never pledged in any manner whatever. There was no contract, engagement or promise, either written or verbal, relating to the house and lot, and of course, none that could bind them. These gentlemen did not lend their names with a reliance on this fund, but either upon his general credit, or upon the credit of another fund of which they might have supposed him possessed; and if they have any resort distinct from the other creditors, it must be to that fund to which they gave their credit. If he had covenanted to convey a house and lot, no specific execution of the contract could be decreed by ordering the transfer of stock; and as he covenanted to transfer stock, how can it be called an execution of the contract by conveying a house and lot? If they had taken his bond for the conveyance of a particular house and lot at a distant day, without knowing that he had a title to them, by so doing they would have trusted to his personal responsibility; and if it eventually turned out that he had no title, what court is there on earth, that would have decreed them a preference, upon this bond, over other creditors? It will hardly be contended that an engagement to transfer stock is entitled to a more specific execution, or to a greater indulgence than an obligation to convey land.

But it is said, the title of the assignees can only relate to the act of bankruptcy, upon which the commission issued, and there can be no relation to any antecedent act. Without giving any opinion upon this point, it may nevertheless be answered, that we are not now trying the title of the assignees, but the title of the plaintiff; and the plaintiff must rely upon the strength of his own title, not on the weakness of his adver-

sary's. If the assignees were the plaintiffs, then the first paragraph in the 10th section of the bankrupt law might be important, and it might be necessary to determine whether the adjudication of the commission, would relate to any act of bankruptcy, antecedent to that upon which the commission issued. But here the assignees are in possession, and are not bound to show any other title; if they can in any manner invalidate the deed from *Brown* to Mr. *M'Mechin*, they must proceed in their defence. What were the circumstances under which this deed was made?

It was executed on the day of the act of bankruptcy, upon which the commission issued, and the day after *Brown* had agreed with his friends to deny himself to the sheriff for the purpose of laying the foundation for the commission. If the jury should believe this fact, there can be no doubt but that the deed is void, and is of itself an act of bankruptcy, even although they should find, under the direction of the Court, that the *denial* to the sheriff was not an act of bankruptcy. *Brown* intended that it should be such; he advised with his friends as to the manner of denying himself, and had a witness present to prove the fact. His own mistake in point of law or the mistake of his friends cannot alter the nature of his intentions, which were to commit an act, that he and they believed to be an act of bankruptcy. If therefore, the deed was made after he had formed this resolution, with a view to secure the Messrs. *Pleasants* or Mr. *M'Mechin* for their indorsements, and not even for a debt not then payable, and which they could not demand, it must have been made in contemplation of bankruptcy, is therefore fraudulent, becomes an act of bankruptcy in itself, and is, of course, void. Under such circumstances, it cannot be considered a *bona fide* sale, and is not protected by the last paragraph in the 10th section of the act of Congress.

The case of *Small* v. *Oudley* and the other cases cited by the plaintiff's counsel were where the transfer was accompanied by possession of the goods and leasehold property, and this fact was relied on in all of them; nor does it appear in any of them that the acts were done after a determination formed

and expressed, to commit an act of bankruptcy. There is no pretence here that possession was delivered; for the institution of this suit is proof that the possession remained in *Brown*. I do not, however, consider the possession of real property important in this view; but the determination, to commit an act of bankruptcy on the 20th *February*, is fully proved to have been made on the 19th.

Mr. *M'Mechin's* object was not to secure *Brown* or his creditors, but he stepped in to secure his own particular friends, the Messrs. *Pleasants*, who were not the creditors of *Brown*, but who were apprehensive that they should suffer by their indorsements for him, and would thereby become creditors. He cannot therefore stand in a better situation than they would have been in, if the conveyance had been made to them.

Verdict for the defendants.

District Court of Maryland.

CONSTRUCTION OF MARITIME CONTRACTS.

Opinion delivered by the Honourable Judge Winchester, *on the Construction of Maritime Contracts.*

IN this case the libellant claims wages for services rendered in a voyage from *Baltimore* to *St. Domingo*, and back, and alleges that the voyage which he stipulated to perform was from *Baltimore* to *Curracoa* and back, and not to *St. Domingo* where the vessel did go contrary not only to the articles, but the express understanding of the parties, and the declaration of the libellant, that he would not ship on a voyage for *St. Domingo*. The articles exhibited specify a voyage to *Curracoa and elsewhere;* and under the latitude of the last general words the respondent contends that he was authorized to go to *St. Domingo*, without proceeding to *Curracoa*.

Taking the fact alleged to be true, that the voyage in view and actually prosecuted, was from its commencement for *St. Domingo* and not the port of *Curracoa;* the objection to pay the libellant's wages comes with a very ill grace from the respondent, who shows and rests on his own deception and breach of faith as the foundation of his defence; and the Court would reluctantly discover any rule of law so imperative as to compel the sustenance of such a justification.

The act for the government and regulation of mariners contemplates two species of contract between owners and seamen. 1. For a voyage or voyages. 2. For a term or terms of time. The latter is undoubtedly the proper form of articles where the destination of a vessel cannot be specifically known, and where the vessel is employed on what is called a trading voyage, or is in search of freight. The first, to wit, that in which the voyage or voyages are specified, applies to *designated* ports, or particular kinds of voyages known and understood to be governed in their extent and duration.

The term "voyage," like the term "voyage assured," is a technical phrase, and always imports a *definite commencement and end. Nomen loci ubi navis oneratur et nomen loci quo navis tendit.* The voyage from *Baltimore* to *Curracoa* is therefore a *specified* voyage, the labour and hazard of which is known to all parties; and for *that* voyage the agreement is such as the statute requires. But the terms "*and elsewhere*" are added to this specification of voyage, and it is insisted by the respondent's counsel, that under these words he was authorized not only to invert the order of voyage specified in the articles, but to go to any other port, as to *St. Domingo.*

If this construction was sound, the provisions of the act of Congress, which requires a specification of the voyage, when the hiring of seamen is not for a given time, become a dead letter; because there would be no *terminus ad quem*, which is essentially necessary to the legal sense of the term "voyage." The terms "and elsewhere" must therefore be construed as subordinate to the voyage specified, and can only authorize the pursuing such a course as may be necessary to accomplish the principal voyage, or in other words, to import no more than the law would imply as incidental to the main contract. All arguments which rested on the defendant's right to construe these articles as giving him the *alternative* of several ports, must fail of course. Indeed there is nothing in the words of the contract which, independently of the ground before taken, would warrant, by rules of law or grammatical construction, such an interpretation. The term *and* is properly conjunctive; and is never construed to be disjunctive unless when coupled with a manifest intent apparent upon the writing itself, that it was used in such sense and for such purposes by the parties. The only intent manifested upon the face of the articles before the court, is such as is fairly to be understood by the words from *Baltimore* to *Curracoa and* elsewhere; and it would be doing very great violence to these words to invert the order of ports; for if the respondent is once exempt from the necessity of proceeding to *Curracoa*, the specified voyage, there is nothing which would restrain his entering upon the most remote and

perilous voyage, the adventurous and enterprizing spirit of commerce could suggest. I do not wish to be understood as giving any opinion, that it is essential to the validity of seamen's articles, that there should be an insertion of the *name* of every port to which a vessel may proceed in the course of trade; but that there must be some equivalent specification, such as to a port or ports, island or islands in the *West Indies*, or to the *Mediterranean*, or the like. The legal termination of such a voyage is ascertained by the most solemn decisions and able opinions.

But for a moment let us adopt the construction of the respondent's counsel, and admit the words "and elsewhere" to be understood in the alternative, as wished by the respondent, and apply the same rule in favour of the libellants. The clause in the articles runs thus: "We the undersigned have shipped as "mariners on board the schooner master, "for a voyage *from* the port of *Baltimore to* the port of *Curra-* "*coa and elsewhere*, at the monthly wages, &c." Admit that the respondent was not bound to proceed on the voyage to *Curracoa* by reason of the words *and elsewhere*, which shall be construed to give him an election to go to *St. Domingo*. The right then is commensurate with the whole case, and considering the word *and* in its disjunctive character and importing the the same as OR, it must be construed throughout as a disjunctive; and the articles must then be read thus, for a voyage from *Baltimore or elsewhere*, to *Curracoa or elsewhere;* for the port of *Baltimore* is not more positively described as the port of departure, than *Curracoa* is as a port of destination. The term voyage is the antecedent to which the disjunctive relates. It would then be open to the libellants to argue and prove that he did not mean to sail from *Baltimore* but another port, as *New-York* for instance, and not to *Curracoa* but *Cuba*. This would be opening the door to all the dangers and inconveniences so wisely guarded against by the act of Congress, which requires an insertion of the voyage or voyages contemplated.

And I would put it to the consideration of the respondent's counsel, whether, (supposing there was no rule of law binding

in this case, and it rested upon the sound discretion of the Court, and considering the characters who usually foment and conduct disputes in favour of seamen, and the character of the witnesses frequently produced to establish their claims when resting wholly on parol evidence,) the interest of merchants and ship owners and public morals as well as private justice will not be more effectually subserved, promoted and secured, by the rule I have taken, than the one for which he has argued.

It was decided by my predecessor, that the words "and elsewhere," annexed to a specified voyage, did authorize the proceeding to *one other* port, but still that the ports must be proceeded to in the order of their specification. I never was satisfied with the first part of that opinion, as I have often incidentally mentioned, but the point has never been directly brought before me until in this case. I have long combated with my impressions on this question; but on the fullest consideration, I do hold myself bound to declare, that the words "and elsewhere," used as they are in this case, cannot authorize a new voyage, unless such an intent is fairly deducible from some relative expression, and that their true construction is subordinate to the principal voyage. It is due to the memory of Judge *Paca*, as well as myself, to state briefly the reasons of my opinion.

It has been argued, that these articles are to receive such a construction as will comport with the usual course of the *West India* trade; which is stated to be, to seek the best market without regard to the particular ports specified. I do not know whether such be the usage, nor is it material to inquire, for as applied to the construction of a written contract, and to control legal rights, it is at direct war with every principle of law and policy. The argument from the admission of evidence to explain the course of a voyage does not justify the inference analogically drawn by the respondent's counsel. The duty of a captain is to proceed in the *usual route* of the *voyage* to his place of destination. There is a plain distinction between the *voyage* itself and the route of the voyage. The voyage is characterized by its *termini*. No evidence is admissible in any case to substitute other *termini;* but of two routes, it is lawful

to show that either is equally safe and common. *Distinguitur iter a viaggio.*

In the case before the court, the voyage, for which the seamen shipped, never had any commencement. The vessel sailed direct for *St. Domingo*, and not for *Curracoa*.

In 2 *Emerigon* 34, 35. the construction of these general and indefinite clauses is ably investigated, and unless I had found myself supported by very respectable authority, the decision of Judge *Paca* would have been adhered to by me until reversed by a superior court. This respectable author declares that these vague and indeterminate clauses are to be interpreted by the principal object spoken of, and in case of doubt are to be understood relatively to law and the usages of commerce.

Thus an insurance for *time*, with permission to trade *where ever the captain shall think fit*, does not protect against a loss occasioned by smuggling. The assurers answer for no loss arising from the fault of the assured, although smuggling in a foreign court is not considered a crime or legal fault. These clauses, however general in their wording, are always expounded according to good faith, and admit neither of *fraud* nor *surprize; generaliter probandum est, ubicumque in bona fide judicis confertur in arbitrium domini vel procuratoris ejus, conditio; pro boni viri arbitrio hoc habendum esse.**

In the opinion of the court, the words of the statute "what port, harbour or creek," were considered very express and equivalent to licensing for a *voyage*.

If this determination does not exactly run on all fours with the case to be decided, its principles are so nearly similar as

[* A very important decision has taken place in England before the honourable Chief Justice, Baron Eyre, on the construction of the tenth sect. of the stat. 24 Geo. 3. c. 47. (1 Anstr. 23.) regulating the coasting trade, and licensing vessels, and providing that such licence shall specify the tonnage, &c. of the vessel licensed, and for what *port*, *harbour* or *creek*, she is about to sail. A licence was granted, "to be employed in the coasting trade," generally. In support of this licence it was argued that it meant to include all the ports in England, which is the same thing as if it specified every one; and it was agreed that such was the common form of licences to coasters.]

to render an accurate discrimination very difficult, if not impossible. The *voyage* or voyages for which seamen ship are required by the statute to be specified in their articles. The term *voyage* imports navigation from one port to another, and perhaps, if not otherwise expressed, *back again.* In the plural it imports, a commencing at more than one port, or in other words, at several specified places. The commencement and termination of a voyage or voyages are ascertained by the ports or harbours from and to which a vessel is destined. The terms, "to trade along the coast," or "to every port, harbour or creek," include all the ports, harbours and creeks of a nation, in which a vessel is licensed for coasting trade. But it is not a compliance with a statute which enjoins that the particular ports shall be inserted. To require the insertion of the *voyage*, is neither more nor less than the insertion of the ports or harbours from and to which the vessel navigates. Of consequence, the unqualified term "elsewhere," applied to a specified voyage, is not designatory of any port or place, nor is it relative to any voyage in the legal sense of the term; it has no specific relation to any port or place whatever; and to apply it to all ports or places in the world would be as inconsistent with justice, as it would be unauthorized by law.

This decision is not different from old determinations. The rules, which apply to a right to a private way at land, cannot materially vary from those which are applicable to a contract for service in a voyage at sea. A prescription for a way is not good if it does not say *a quo termino ad quem* the way goes. Resolved *Yel.* 164. and this not indefinitely but certainly, 2 *Leo.* 10. As from *A* to a *rectory*, the *terminus ad quem* is uncertain, for the rectory consists of glebe, tithe, parsonage, &c.

So, that he is seised of *B.* and has a way through the close of the plaintiff to the *Thames*, for he ought to say that he has a way *from B.* through the close, &c. to the *Thames. Mod. Cas.* 3.

If this case should still be considered doubtful, let the argument *ab inconvenienti* be applied, and what will be the result? The construction I have adopted can never produce inconvenience to the ship owner, since in almost every case he does order the route and destination of her voyage previous to her

departure; and it is easy and just to make his agreement with the seamen conform to such orders. If there is a discretionary authority confided to the captain to proceed to other ports, such authority will at least be limited by some bounds; and the articles should be drawn to meet such an alternative voyage, and to conform to the real object of the owner; and this object, so far as the rate and wages would be influenced by it, ought to be communicated to the sailors; or if it is not thought expedient to do so, they should be hired for a term or terms of time, as authorized by the act of Congress. While the ship-owners are thus fairly secured against inconvenience, no more than justice is secured to the seamen. Adopt a different rule, and they may unjustly be entrapped into voyages of greater length, more hazard, peril and labour, and of course for which they ought to receive greater wages and greater advance; and of which increased compensation they would be deprived under such general words, too often improperly and most frequently thoughtlessly introduced into their articles.

The considerations of policy and the general rules of law, before stated, have great weight with me. Indeed I think it more desirable, that the principles of mercantile law should be referred to general axioms, than to the unbending authority of particular decisions: and it is therefore my custom not to refer so much to cases or opinions, as to universal principles. But on this occasion I shall add the weight of some opinions from a source to which we resort habitually for our judicial direction.

It is stated by *Parke* (title *Deviation*) "that it is necessary to insert, in every policy of insurance, the place of the ship's departure and also of her destination;" and in a preceding part of his work, page 23. *ed.* 1787, when referring to the same rule, he remarks, "this has always been held to be necessary in policies, at least for upwards of two hundred years; and must be so, on account of the evident uncertainty which would follow from a contrary practice, as the insurer would never know what the risque was he had undertaken to insure."

Molloy 6. 2. *c.* 7. § 14. has laid down this doctrine, that if a ship be insured from *London* to (a blank being left by the lader of the goods to prevent her surprize by an enemy,) if she

happen to be cast away, though there be private instructions for her port, yet the insured must sit down with his loss, by reason of the uncertainty. " Such also, says *Parke*, is now the law and usage of merchants."

These opinions and principles are supported by the determination in *Lavabre* v. *Walter*, *Douglas* 271., in which the voyage insured was described in these words, " at and from port *l'Orient* to *Pondicherry*, *Madras* and *China*, and at and from thence back to the ship's port or ports of discharge in *France*, with liberty to touch, in the outward and homeward bound voyage, at the isles of *France* and *Bourbon*, and at all or any other ports or places whatsoever; and it shall be lawful for the said ship *in this voyage* to proceed and sail to, and touch and stay at any ports or places whatsoever, as well on this side as on the other side the Cape of *Good Hope*, without being deemed a deviation." The ship went to *Pondicherry*, whence she went to *Bengal*, back to *Pondicherry* and sailed thence for, and was captured on her return to *l'Orient*. Both going and returning she either touched at, or lay off *Madras Masulipatam*, *Visigapatam* and *Yanon*, and took in goods at all those places. This was held to be a deviation. This case is also very accurately reported in *Emerigon*, who remarks on the policy, " that however general the words of the policy were, they could not be construed more largely than the specified voyage, which was for *Pondicherry*, *Madras* and *China*."

These cases apply to the construction of the loose and indeterminate clauses of maritime contracts; and when fairly investigated will be found no more than a correct application of old and well established rules drawn from *Roccus*, *Stympanus* and *Le Guidon le Mer* to modern cases.

But the case of *Wooldridge* v. *Boydell*, *Doug.* 16. more immediately resembles the case now before the Court in its facts and circumstances than any I have referred to. See *Park* 260. S. C. *

[* The above decision is faithfully copied from a MS. in the writing of its highly distinguished author. As it was not prepared by him for the press, this explanation is due to his memory, on the part of the Editor.]

Vice-Admiralty Decision

OF

SIR JAMES MACKINTOSH.

WHERE the *British* orders in council operate as a relaxation of the law of nations in favour of neutrals, the Vice-Admiralty Courts are bound by them, *secus* if they extend the law of nations to the prejudice of neutrals.

Minerva, Frederick Hussey, Master.

ON *Friday* the 11th instant Sir *James Mackintosh* gave judgment in this cause.

This was a case of an *American* ship taken on the 3d of *December*, 1806, going from *Manilla* to *Batavia*.

The ship had left *Providence* in *August*, 1805, and touched at the *Isle* of *France*, from which place she sailed to *Batavia*, thence she went to *Tegall* and *Manilla;* and on her voyage from this last place back again to *Batavia* she was detained. Her cargo chiefly consisted of *indigo* and dollars.

It appeared that she was under the direction of a supercargo on board, as to her employment in trade both in respect of the cargoes and the intermediate ports to which she was to trade, previously to her return to *Providence* or some other port in *America*, where her voyage was to end.

For the captors, it was contended that she was trading between enemies' colonies, and therefore acting in direct violation of the letter and spirit of his majesty's instructions of *June*, 1803, which instruct the commanders of ships of war and privateers not to seize any neutral vessel which should be carrying on trade directly between the colonies of the enemy and the neutral country to which the vessel belonged.

For the claimants it was insisted that neither *Manilla* nor *Batavia* nor the *Isle* of *France* was an enemy's colony of such a nature as to render the trading thereto by a neutral in time of war illegal; inasmuch as the trade to those places was open to foreigners in time of peace.

The Court on a former day had directed commissions to be sent to *Bengal* and *Madras* to ascertain whether the ports of *Batavia* and *Manilla* were during the last peace open to any foreigners from the ports of *India*, *Europe* or *America?* and if open, whether under any, and what restrictions? and also to inquire into the state of those ports, in these respects, before the war which broke out between *Great Britain* and *Spain* in the year 1796.

These commissions being in part returned, and it appearing that the ports were open to all foreigners during the last peace, without any restrictions except as to opium and specie at the port of *Batavia*, Sir *James Mackintosh* pronounced judgment of restitution.

The captors, he said, were fully justified in detaining this vessel, because in so doing they were acting in obedience to the letter of the instructions of *June*, 1803. *Batavia* and *Manilla* were certainly colonies of the enemy, and this vessel was certainly not trading directly between *America* and such colonies. But though the officers in his majesty's service were bound to obey these instructions, he did not conceive himself, sitting as a judge of prize, in a court whose decisions were to be regulated by the law of nations, as bound and concluded by them. He believed indeed that he was the first and only judge who had ventured to pronounce such a doctrine. In every prize court, in every country, by all writers on the subject, and all administrators of the law, the instructions of the sovereign were regarded as a law to the judge. But he considered the law of nations as paramount to such instructions; and the king as having indeed a right to dispense with such law, but not a right to extend it. As far, therefore, as any of his majesty's instructions were a relaxation of the law of nations in favour of neutrals, he should consider himself bound by them; but if he saw in such instructions any attempt to extend the law to the prejudice of neutrals, he should not obey them, but regulate his decision according to the known and recognized law of nations.

In the present case, after great deliberation and minute in-

quiry, he felt himself bound to say, that neither *Batavia* nor *Manilla* was such a colony as to render any trading by neutral nations in time of war illegal.

It is not their being called colonies, that will render such a trading unlawful; notwithstanding the letter of the instructions of 1803, something farther is necessary, and that is, that the trade to and with these colonies was prohibited to such neutrals in time of peace.

October 24. Some misapprehensions having arisen of the grounds upon which we stated, that the judgment of the Court of Admiralty proceeded in the case of the *Minerva*, Captain *Hussey*, mentioned in the *Courier* of the 19th *September*, 1807, we take the liberty of stating somewhat more explicitly what we conceived to have fallen from the bench, and to have been the foundation of the judgment in that case.

The chief point in dispute, which was investigated by means of commissions to *Calcutta* and *Madras*, was, whether *Manilla* and *Batavia* were colonies of the enemy, in the sense meant in his majesty's instructions of 1803; or whether they enjoyed such a freedom of trade with other countries, in time of peace, as took them out of the situation of settlements governed on exclusive colonial principles. The result of the inquiry was, that it appeared, that *Manilla* and *Batavia* were not colonies in the sense of his majesty's instructions, as it was found that they were not shut against foreigners in time of peace; and in consequence the ship was ordered to be restored to the claimants.

It is to be observed, however, that the learned Judge, though he ordered restitution to be made, refused the claim of the neutral for costs and damages, as the captor seemed to be fully justified in this case by the letter of his majesty's instructions, and from the prevailing uncertainty, whether or not *Manilla* and *Batavia* were to be considered as colonies.

The case of the *Minerva* is one that cannot again speedily occur. The recent instructions of 1807, inserted in the *Courier* of *July* 4th, 1807, and which direct all ships to be detained that are found trading between any two ports of the enemy, whether colonies or not, put an end to any doubts or dispute

that might have arisen on the question. Every ship found in such a situation must be brought in as a prize; and *Manilla* or *Batavia* is now entitled to no more privilege than any other ports of the enemy.

It ought also to have been remarked, that when sir *James Mackintosh*, in observing on some reasonings that were held in the pleadings, stated a doubt, whether a judge, acting under the law of nations, would be bound to decide according to instructions, issued by any prince contrary to the law of nations, he expressly stated the instructions of 1803, to be of a very different description, and as such, the ground of his judgment in the case.

COURT OF ADMIRALTY.

DOCTORS' COMMONS,

SATURDAY, JANUARY 21st, 1804.

The Eliza, Haff, master, before the right honourable Sir William Scott.

The following case, of which the manuscript copy has been handed us by a friend, will be read with no ordinary share of interest, as it contains the latest decision pronounced by Sir *Wm. Scott*, on the former criterion as to what should be a discontinuance of a voyage, and which is directly in the teeth of the latter criterion at this time acted upon.

At present we confine ourselves to a single observation; had it not been that the extremities of this country, as a neutral nation, have driven her to examine with the eye of severe criticism the juridical decisions of this celebrated civilian, his fame might have been left to stand on a broader basis than that of an *eloquent judge*.*

SENTENCE.

COURT. The only question in this case is, whether there had been such a *bona fide* importation of the bulk of the cargo in *America* as to break the continuity of the voyage.

There is no question as to the property; but, under all the circumstances, it is fit the Court should call for proof that the continuity of the voyage (taking it in the most favourable view) which began at *Martinique*, had been broke by the entrance of this ship in a port in *America*. As to laying down any rule, an actual payment of duties and a landing must, in my mind, constitute a full and fair importation, and in general, where that appears, the court will look no farther; and where the papers are fair, it might induce the Court not to put the parties to further expense. But are there not circumstances in the present case which tend to deduct from the apparent credit of the transaction? The Court would be inclined to show indulgence when

* *New-York* Evening Post.

there are no special circumstances to raise a surmise that the fact might be otherwise.

Now, in this case, it certainly does appear that the sugar was brought from *Martinique*, and with this addition, that the master says he does not know of what country it was the growth or produce. I do not impute to the master any thing; but he being connected with, and employed in the ship in the manner he has been, it is rather singular that he should labour under such an utter ignorance of this fact; it is a circumstance disadvantageous to the case; and it would have been more satisfactory if the master had fairly stated that in the former part of the voyage the bulk of the cargo had come from *Martinique*. It appears something of a reserve, which seems to take off the credit which otherwise would be due to the documents.

There is proof of a reshipment in *America*, and that supplies the chasm with proof of the unloading; and there is proof of a change of the crew in this case. That is a circumstance which might be interpreted into an unfavourable conclusion, namely, a plan of concealment and suppression of the real destination of this cargo being from *Martinique* to a *French* port; and this reshipment in the *American* port might be done with some intention of throwing a cloud over the fact. I think these circumstances of weight sufficient to overthrow the favourable interpretation it otherwise would be entitled to. The Court, therefore, is not quite in possession of facts fully disclosed, to which it can at present apply any principle of law, but the principle of law must be applied to those facts when fully disclosed. My present inclination is, although the original intention might be to bring goods from the colony to the mother country, yet, if in fact there has been an actual payment of duties and landing with no engagement to return, that that was a breaking of the voyage, and that they must be considered as two distinct voyages.

On the other hand, it would not necessarily follow that any indulgence, which the government of *America* might grant to its own subjects, for the benefit of their commerce, would bind this Court, which acts upon general principles. And therefore,

suppose *America* should declare in favour of its subjects, that they might bring cargoes from a colony and carry them, after landing, to *France*, without payment of duties; I do not conceive such a declaration (feeling all the respect due to the commercial interests of all other civilized communities) would constitute a rule for this Court, or, that it should not decide such to be an entire voyage; I shall therefore call for further proof, namely, what duties were paid in *America*; and also, a precise statement of facts, as to the mode in which these goods were exported.

OPINIONS OF THE TWELVE JUDGES,

ON A POINT IN THE LAW OF EVIDENCE.

THE Judges, agreeably to the order of the House of Lords, delivered their opinions *seriatim*, on the questions referred to them by their Lordships.

Upon the motion of Lord *Ellenborough*, the Judges, whose circuits were to commence the soonest, were heard the first.

Mr. Baron *Graham*, after stating the difficulties in which the question was involved, declared that, in his opinion, the general rule of law, was, that a witness was bound to answer every question touching the issue to be tried, with the exception only of such questions as would expose him to a criminal prosecution, or to a penalty or forfeiture. In the courts of equity, it was the daily practice to force parties to answer the matters alleged against them, whatever pecuniary loss such answers might subject them to. The justice and the reasons of this rule applied equally to the courts of law, although it was not the custom there to examine the parties, as it was in Chancery, where their customs were derived from the civil, instead of the common law. Although in the courts of law, a party could not be made a witness, yet those persons, who were brought forward as witnesses, were as equally bound to declare the whole truth, as the parties would be in a court of

equity. If it were not so, the most monstrous obstructions would be thrown in the way of justice; those persons, who were the best qualified to give important evidence, might generally shelter themselves under that plea. It was, however, every day seen, that pawn-brokers were brought in evidence upon the prosecution of thieves, and stable-keepers on the trials of horse-stealers; and in either of these cases, would it be permitted, for the pawn-broker or the stable-keeper to refuse giving testimony, on the ground of their answers obliging them to restore those things which they had so improperly received. If this were the law, whatever inconveniences might result from it, witnesses would perpetually claim this privilege, either from fear, or through favour. The point had not as yet been settled by any solemn decision, after a full argument; but, from all the lights that he could derive, and from the monstrous inconvenience that would result from the contrary supposition, he declared his opinion, as to the first question, that a witness is bound to answer all such questions as do not expose him, either to criminal prosecution, penalty or forfeiture; and as to the second question, that the rule applies to the witnesses on a trial or a suit, where his majesty is either plaintiff or prosecutor.

Mr. Justice *Chambre* was of the same opinion. In the courts of equity, not only a person might be compelled to answer questions which would severely affect their pecuniary interests, but bills of discovery were filed, for the express purpose of obtaining an answer upon oath, which answer might be read as evidence in the courts of law. The rule had been laid down by Lord *Mansfield*, which had been generally considered as the true one, that in all cases where a witness could be forced to answer by a court of equity, in order that his answer might be read as evidence in a court of law, in all such cases, a court of law should compel him to answer at the trial. The only cases where a party could refuse to answer was, where it would expose him to either criminal prosecution or to penalty or forfeiture. This was what he conceived was the rule also at common law; and it most unquestionably ought to be the

rule, for he thought there could be no reason assigned why a man should conceive himself privileged to conceal the truth, or to refuse to do justice between *A.* and *B.* on the ground that if he did so, *C.* might have an action against him; which would be to say in other words, "The public must not call upon me to give evidence or do justice between *A.* and *B.* because such evidence might prevent me from acting unjustly by *C.* or *D.* to whom I wish to act unjustly, and from whom I should wish to withhold a just debt." As to the authorities upon the point, there were on one side a great variety of opinions expressed at *Nisi Prius*, and on the other, the rule so laid down by Lord *Mansfield*, and which he now considered to be the law with respect to evidence. There had been also a case in the Court of Exchequer, where an attachment was ordered against a witness for refusing to answer on these grounds. When he considered the practice of the courts of equity, and the manner in which this practice had been adopted in the courts of law, and also when he considered the great obstruction which would be thrown in the way of justice, if the contrary practice should prevail, he should give his decided opinion, that a witness was bound to answer questions which did not expose him to criminal prosecution, penalty or forfeiture, even although his pecuniary interests might suffer by such answer.

Mr. Justice *Le Blanc* agreed most decidedly with the opinions which had been delivered by the Judges who had preceded him. He considered that it would be subversive of justice, and a thing not to be endured, if agents, brokers or persons who managed insurances, were to decline being examined, on the ground of their being themselves made liable to a civil action. Although he professed the highest regard for the authority of those judges who held the rule to be the other way, yet it must be recollected that the point had never been seriously argued before, or probably those great and learned judges might have altered their opinions. He had always held that witnesses could be compelled to answer questions even although their answers might expose them to civil

actions; and the more he considered the practice of the Courts, and the reason on which it was founded, the more he was confirmed in the opinion. He, therefore, agreed with his learned brethren in the answers they had given to the questions that had been submitted to their opinion.

Mr. *Justice Grose* differed in opinion from the learned judges who had preceded him. He conceived, that, by the mild laws of this country, no man was bound to criminate himself, or to give evidence against his own pecuniary interest, and perhaps to his utter ruin. It was allowed, that neither in courts of equity nor at law, was a man bound to answer what might expose him to a penalty or forfeiture. He could not see the reason why a man should be excused from answering questions which might expose him to the penalty of five pounds for killing a hare, and yet should be obliged to answer questions which might expose him to ten thousand pounds in damages, or to lie in jail all his life if he should be unable to pay those damages. The difference, it appeared, was more grounded upon practice, than upon any principle. The practice, however, of the courts of equity, differed most materially from that of the courts of law. In the courts of equity, although the parties were liable to be compelled to answer upon oath, yet they had time for due deliberation and legal advice, and besides the answers could not afterwards be misrepresented. It was very different, however, in a court of law, when a question rapidly put by an ingenious lawyer, and answered without consideration, might expose the witness to ruin. If this answer could be given against him as evidence in another trial it would be given in without the witness having any opportunity to explain his answer. There were many other differences between the rules of evidence in the courts of equity, and those of common law. In the former, an infant could not be compelled to answer, in the latter he could. He did not consider that the principle laid down by Lord *Mansfield* was entitled to more weight, than the opinions of many great and eminent judges, who had determined the other way. His opinion was, therefore, contrary to the opinions expressed by his brother judges.

Mr. Justice *Lawrence* said that he had always, until this question was agitated, considered that the rule of law was, that a witness was excused from answering such questions as involved his pecuniary interest, and so thinking, he had concurred with Judges in refusing a new trial moved for on that very ground. The fact was, that till the present question was started, that there had been no solemn argument upon the subject, and he had never turned his mind particularly to it; but upon the present occasion, having felt it his duty to consider the subject with the utmost attention he could give to it, he had changed his opinion as to the rule of law and was now inclined to consider that it was different from what he had formerly supposed. Which ever way the general rule lay, that rule had many exceptions, and, although he could see many inconveniences resulting from the affirmative, as well as from the negative of the question which had been put to the Judges, yet he thought the mischiefs resulting from the negative of it considerably predominated. He therefore now considered, that the general rule of law was, that a witness was bound to answer questions, although he might become liable to a civil action in consequence of his answer.

Mr. Justice *Rooke* coincided with Mr. Justice *Grose* in his opinion, that a witness was not bound to answer questions which might materially affect his pecuniary interest. He did not apprehend such evil consequences from this rule, as those who held an opinion contrary to his. Prosecutors and plaintiffs seldom came into court so badly provided with testimony, as to rely entirely on what they were to pick up by cross examination from an unwilling witness. Neither did he think that they would decline answering on a pretence of their pecuniary interest being endangered, if upon examination it appeared that their interest was very minute. He thought a much greater danger would result from allowing a hasty answer, unexplained and perhaps incorrectly taken down, to be read against the witness afterwards. He mentioned an extreme hard case; it was that of Lord *Keith*, who by an answer he gave, in an insurance case, where he was called as a witness, subjected

himself to an action in which 10,000*l.* damages were given against him.

No court of equity could have compelled him to state every irregularity he might have committed when commander in chief of the fleet; and yet a hasty answer at *Nisi Prius* was given as evidence against him. He considered that evils of this kind were worse than would follow from the rule being the other way. As to the courts of equity, whatever analogies might be drawn, he did not consider that the judges of the common law were bound to go into the Court of Chancery to find out what rules of evidence were received there. In the whole of his practice at the bar, and of his experience on the bench, he considered that witnesses might object to being examined on matters that would expose them to civil actions. He thought that no third person had a right to extort from a witness what debts he owed, or what slander he might have committed, which would expose him to actions. If that were the rule, it would change the whole practice of the law, as dishonest practitioners would bring actions against one person, merely to extort evidence against another. He therefore was of opinion, that a witness was not bound to answer questions which would prejudice his pecuniary interests, and expose him to civil actions.

After Mr. Justice *Rooke* had finished, the further hearing of the judges was postponed till to-morrow. Adjourned.

The Judges who had not delivered their opinions on the case of Lord *Melville's* witness indemnity bill, on the question, "Whether witnesses were bound to answer questions, if their answers subjected them to civil process," were heard *seriatim*.

Mr. Baron *Thompson* at great length stated his opinion, that witnesses were not compellable to answer such quesions.

Mr. Justice *Heath* and the Lord Chief Baron were of opinion, that witnesses in such cases were compellable to answer such questions.

Sir *James Mansfield*, Chief Justice of the Common Pleas, stated his sentiments to be the same with Mr. Baron *Thompson's*, that they were not compellable.

Earl *Stanhope* then rose and expressed his regret there should be such a difference of opinion amongst the learned Judges. In order, however, to get at the evidence of witnesses in that situation, he suggested the propriety of a bill, (by which the whole evidence of such a witness might be obtained,) enacting that the creditor should be precluded from taking advantage of any answers to the interrogatories he should give under such circumstances. He read the bill as part of his speech, and the title was immediately after read *pro forma* from the woolsack.

Lord *Eldon* did not rise to give any opposition to a bill, the object of which was to set at rest a question, which after the opinions delivered from such high authorities, must be attended with such considerable difficulty and uncertainty. The whole of his life had been devoted to the labours of his profession; and in the long experience the exercise of his duties had supplied, he did not recollect a single instance in which he had heard the objection stated by a witness or for a witness, that the effect of his answer would be, that it would render him responsible in a civil suit. Whatever concurrence he might feel with a noble lord, in the object of his bill, he was by no means satisfied that the form of it would answer the design the noble mover intended. The witness ought to be rescued from any civil consequences of his own evidence, from any quarter whatever, by which that evidence might be converted to his disadvantage. Not only the depositions given by the person himself in court would be brought against him, but every idle spectator, who attended, might render him liable by giving evidence to the testimony so delivered. The matter would require long and attentive deliberation. The personal exertions of no one man in the history of *British* jurisprudence furnished him with such abundant means of information, as those of the noble lord now on the woolsack; and he (Lord *Eldon*) would venture to anticipate, that this noble lord had never known an instance during the protracted period of his practice, when such an objection had been taken on behalf of the witness.

The Lord Chancellor left the woolsack. He felt it his

duty to communicate his sentiments on a subject of so much consequence to the proceedings in courts of law. He had been for seven and twenty years engaged in the duties of a laborious profession; and while he was so employed, he had the opportunity of a more extensive experience in the courts, than any other individual of this time. It was true, that in the profession there had been, and there now were, men of much more learning and ability, than he would ever pretend to; but success in life often depended more upon accident and certain physical advantages, that upon the most brilliant talents and profound erudition. It was very singular, that during these twenty-seven years, he had not for a single day been prevented in his attendance in the courts by any indisposition or corporeal infirmity.

During much the greater part of this period, he had been honoured by a gown of precedency, and in consequence of this privilege, had not only been engaged in every important cause, but had conducted causes of this description during that period in the Court of King's Bench. But with the history of his professional life, their lordships had no co: ern, otherwise than as it was connected with the present inquiry. For this purpose it was material to declare, that although his experience was equal not only to any individual Judge on the bench, but to all the judges, with their collective practice, yet that he never knew a single objection to have been taken to an interrogatory proposed, because the reply to it would render the witness responsible in a civil suit. It was true, that in Mr. *Peake's* book which had been frequently cited on the present occasion, there was a note by which it should appear that an objection of this kind had been taken by the late Chief Justice *Kenyon;* but notwithstanding his high opinion of the minute accuracy and great learning of that reporter, he thought he had in this instance been guilty of a mistake on two grounds: 1st, because he himself had been counsel in the cause, and had no recollection of the circumstance; 2dly, because, if that note were correct, Lord *Kenyon* must have been guilty of an obvious contradiction of his own principles and sentiments, as they appeared even on the face of the same report. His lordship was of opinion, that the bill now proposed would not effectually answer the purpose

intended by the noble mover. He most heartily concurred in the object, but most materially differed from him on the means of effecting it. Notwithstanding some difference of opinion among high authorities, among persons for whom he had the greatest veneration, yet he could not help thinking that the law itself was unembarrassed with these contradictions. He considered it so far precise, clear and perspicuous, that it was necessary no new law should be promulgated, otherwise than in the form of a declaratory law, by which it should be announced what had been the law, what was the law, and what ought to be the law, and what should be the law of the land, as to this important particular. On these grounds he could not give his assent to the bill now suggested; and if no other noble lord, more competent than himself, would undertake the business, he should himself move a legislative regulation, with the view to place the question for ever in repose.

Lord *Ellenborough* perfectly coincided with the sentiments of his noble and learned friend on the woolsack. The labours of his existence had also been devoted to the same arduous duties, and he had attended a circuit the largest in extent, and the most comprehensive in the variety of its business; but neither in the course of his experience on his itinerant duties, nor during his constant application at *Westminster-hall*, where he might say he had been engaged in almost every important cause, nor since he had been called by his Majesty's pleasure to the bench, where he now had the honour to preside, did he recollect a single instance where the objection had been taken, that the answer of the witness would place the deponent in a situation of responsibility to a civil suit. It was true, that where the reply to the question would expose the witness to the consequences of a criminal prosecution, his lordship always felt it his duty to caution him from the bench; but even in that case, partial communications must not be made; the testimony must not be garbled: if a portion were imparted the whole evidence must be disclosed, and so it was held by the noble and learned Lord whom he had the honour to succeed, with much inferior powers. Although he perfectly agreed with the noble mover on the necessity of some legisla-

tive measure, yet he thought the bill now read would be inadequate to the object proposed; it therefore would not receive his support.

Earl *Stanhope* considered his bill capable of comprising every object suggested by the noble lords who had opposed it, and said that he should move for the second reading on *Tuesday* next. In the mean time it was ordered to be printed. Adjourned.

Circuit Court of the United States.

PENNSYLVANIA DISTRICT,

United States *v.* Morrow Lowrey, Andrew Lowrey and John Lowrey.

THE Circuit Court of the *United States* proceeded on *Monday* last to pronounce sentence on *Morrow Lowrey*, *Andrew Lowrey* and *John Lowrey*, convicted last week, of opposing the Deputy Marshal, when executing writs of possession issued from that court. An excellent admonition was delivered by Judge *Washington* to the prisoners, previous to pronouncing sentence.

The prisoners were separately indicted for obstructing the execution of the process of the Circuit Court of the *United States*, on the 22d section of the act of Congress passed 30th *April*, 1790, which enacts, "That if any person or persons shall knowingly and wilfully obstruct, resist or oppose any officer of the *United States*, in serving or attempting to serve or execute any mesne process or warrant or any rule or order of any of the courts of the *United States*, or any other legal or judicial writ or process whatsoever, or shall assault, beat or wound any officer or other person, duly authorized in serving or executing any writ, rule, order, process or warrant aforesaid, every person so knowingly and wilfully offending in the premises shall, on conviction thereof, be imprisoned not exceeding twelve months, and fined not exceeding three hundred dollars."

It appeared in evidence that *Robert Bowne*, a citizen of the state of *New-York*, had obtained judgments in ejectments against *Morrow*, *Andrew* and *John Lowry* for the premises held by them respectively, and that writs of possession issued from the Circuit Court to restore the possession of Mr. *Bowne*. The Deputy Marshal, in proceeding to execute these writs, found the prisoners with others, their associates, on the premises armed in their defence; the doors of their houses closed against him; admittance refused him; and they moreover threatened to take his life if he persisted to execute the process, declaring at the same time they would lose their own lives in defending the possession. He was obliged in consequence to desist from executing the process, and return home.

SENTENCE.

Morrow Lowrey, *Andrew Lowrey*, *John Lowrey!*

You severally stand convicted, two of you by juries composed of your fellow-citizens, and the third by confession in open court, of a successful, though temporary opposition to the laws of your country, by resisting the legitimate authority of an officer of this Court in the regular discharge of his duty.

You have experienced on your trials every indulgence which the Court could grant, and have had the assistance of able counsel to defend you. Every objection in point of law which had the semblance of plausibility was urged in your behalf: for, unfortunately for you, no circumstance occurred in the evidence, which could cast a doubt over your guilt, or extenuate its enormity.

Is it possible that you could for a moment have entertained the expectation, that it was in your power to obstruct, with effect, the streams of justice, which give life to the political body, and by which that liberty which we all profess to love, is refreshed and invigorated? Did it never occur to you, that if a few interested and misguided men of your neighbourhood sanctioned your lawless conduct, that a better intelligence and a superior interest would nerve, if necessary, the arms of a thousand fold your number to crush you?

Guarded as she is by all the power of this nation, Justice sits securely on her seat, and issues her lawful mandates, which no force can successfully resist, but such as is strong enough to overthrow the whole fabric of the constitution. From the nature of our government, it must be so. The courts of justice are the sanctuaries of the law; and it is through the law that our government speaks and acts. Impair, by any means, the power of these tribunals in the lawful exercise of their functions, and you attack the majesty of the law, and sap, most essentially, the foundations of the republic. The government, in a degraded state, may survive the shock, but it ceases to be a government of laws; and liberty expires when force, the only remaining alternative, becomes necessary to coerce obedience to the will of the nation.

Recollect that the state of *Pennsylvania*, powerful and respectable as she is, forms but a small part of the *United States;* and that the district of *Erie*, though it were united in a common effort inimical to the tranquillity of the whole nation, is but a spot on the map of the state. What folly then could tempt you, who with your associates, if you have any, are I trust an inconsiderable minority in your district, to raise your hands against the government of your country, acting lawfully through one of its constitutional organs? You might for a day or a month impede the administration of justice in your particular cases. But it was utterly impossible that your triumph could be more than temporary, and with the certain loss of possessions which were not legally yours, you doomed yourselves to imprisonment, and to loss of property to which you were entitled.

Should you deem too severe the punishment which the law decrees for your offence, reflect for a moment what had been your situation had the officer persisted in his attempt to do what prudence forbade (but which the laws would have sanctioned,) and you had executed the threats which you wickedly denounced against him. Your lives must then have atoned to your country for her violated laws; but where was the circumstance to extenuate your guilt in the eyes of an offended God?

Suppose you could have influenced numbers to assist you in opposing the execution of the law, how would your guilt have been increased by the treason and punishment of those you had deluded! I mention these circumstances with a view to impress upon your friends the conviction of this truth, that the highest crimes, against the laws of God and of society, are in the train of the offence of which you are guilty. There is every reason to believe, that had the officer been less prudent, you had, in acts at least, been more criminal.

The Court has carefully perused the papers which you requested to be read, with a view, as was supposed, to extenuate your offences, and mitigate your punishment. We have to regret however, that in these documents we discover nothing but an effort, which ignorance only could have suggested, to justify rather than to excuse yourselves.

You complain that the judgments in ejectment upon which the process of execution issued were not sanctioned by the principles of law, were rendered by an incompetent tribunal, and were unfairly obtained. Were we for a moment to admit that these objections were well founded, were there no other means by which you could be redressed, but by a resort to force? if the judgment of this Court were erroneous in point of law, it was subject to the correction of a higher tribunal, as capable, as it would have been ready, to rectify our mistakes. To this tribunal an appeal was made in a case resembling yours in its essential features, for the purpose of obtaining a just exposition of the law of 1792, the great point in the cause, and there it was investigated by professional talents which would do honour to any country. The decision was against your title, and it became the duty of the presiding Judge of this Court, who had entertained a different opinion, as it was certainly yours, to submit to this high authority.

The question of jurisdiction in your particular cases was decided in this Court, how correctly in point of law, it would ill become me to say, but I dare aver that the judgment was influenced by no considerations which could impeach its purity.

That the trial, so far as came within our view, was fairly

conducted, can be attested by those whose evidence would not be suspected. That it was ably and faithfully managed by your counsel, no man will doubt, who knows who your counsel were. The declaration imputed to the judges of the court, which it is said misled you, is not true; the opinion given in the cause was in direct opposition to the pretended declaration, and it is absurd to suppose that declaration could have been at variance with the former.

I should not have condescended in this way to vindicate the justice and integrity of this Court, did I not feel a sincere desire to satisfy you, if I can, how grossly you have been deceived by others, or have deceived yourselves, and how totally groundless were the pretexts which led to your misconduct.

That you have been misled I can readily believe. Your conduct has evinced either great ignorance or great depravity. Charity teaches us to impute it to the former; and influenced by this consideration, we are induced to diminish your punishment, which would have been otherwise extended as far as the law would sanction. We feel less reluctance on this occasion, in exercising to your advantage the discretion which the law reposes in us, from the hope that when you return to your families, you will carry with you more correct notions of the duties which you owe to your country and its laws, and that the punishment, mitigated as it is, will prevent the repetition of similar offences by yourselves or others.

The law authorizes the Court to condemn you to twelve months imprisonment, and the payment of three hundred dollars.

The sentence which we pronounce is, that you *Morrow Lowrey*, *Andrew Lowrey* and *John Lowrey*, be severally imprisoned for three months, and do pay to the *United States* each the sum of one hundred dollars, besides the cost of these prosecutions, and that you stand committed till the same be paid, and further that you severally enter into recognisances with sureties to keep the peace and be of good behaviour for one year from the expiration of the said three months, each of you in the sum of one thousand dollars, and two sureties in each recognisance in five hundred dollars each.

Court of General Sessions.

NEW-YORK.

A CASE of singular novelty occurred on *Saturday* se'nnight, in the Court of General Sessions of the Peace, held at the City-Hall of *New-York*, in and for the said City and County.

Doctor *William Little* was put to his trial for an assault upon his wife, Mrs. *Jane Little;* and expectation stood on tip-toe to learn the reason of an operation so long exploded and justly condemned in the practice of the medical society. All eyes were anxious to behold, and all hearts already sympathized with the fair patient; when, at the call of the crier, she came forth; not *fair*, like the swan upon the lake; but like the raven, glossy, as black, and to the full as comely. The attorney general was proceeding in her examination, when Mr. *Sampson*, counsel for the defendant, proposed to shorten the trial by an admission of the fact. But he undertook at the same time, to show, that a more tender or affectionate husband no where existed; and that this incivility would appear, when the defence was known, to be rather a dissembling of love, than an effect of hatred.

Wives were only admitted, he said, to testify against their husbands in cases of great enormity, and when the weaker vessel was in danger and needed the protecting arm of the law. Gentlemen of the jury, said he, I perceive you smile, and I feared it would be so. You see, however, gentlemen, that we are serious. There are causes which present such strong contrast of light and shade, such powerful effects of *claro obscuro*, that no words can heighten their imagery. But still to every imagination the subject may seem differently. Gentlemen, you do not perhaps know upon what foundation my client may have

placed his choice; and as to taste it admits of no dispute: every man must follow his own pleasure. That which seems black, in your eyes or in mine, may be exceedingly fair in his. The education of a physician is not that of a lawyer. He ranges through the wide field of nature, and is not bounded by the narrow limits of positive institutions. He reads not in the books of authority, but in the great volume of nature. He knows by what chemical process all colours may be produced; but that an amiable person and a delicate mind are treasures, under whatever outward varnish; and if a late discovery can be relied on, that *Adam* was black, a marriage in his family can surely disgrace no man. We are ready to dispute in due time and place, and to maintain, that neither philosophy nor religion has forbidden such mixture; and having satisfied our conscience we had no scruple in yielding to our passion. You are in amazement, gentlemen. I did expect no less. You are all under the dominion of prejudice. You do not see clear. I shall be forced, I find, to reveal, in defence of my client, expressions intended only for love and privacy. I shall read to you a letter which no pen but that of a lover and a poet could have traced. It is dated on the 4th of *June*, and addressed to Mrs. *Jane Little*, after the unfortunate occurrence, and in these terms:

"I received your kind letter of the 1st of *June*, and am very sorry to hear of your being unwell. I want my coat, pantaloons and jacket at Mr. *Simeon's* as I have had nothing to lay on but my cloathes since I have been here."

Is not this repentance, gentlemen, even to sackcloth and ashes?

"You write that you'll not appear against me in court, which undoubtedly will be for the best, as I have not forgotten my marriage covenant. The unhappy situation in which I am involved by your hastiness and those that have persuaded you to it, devolves on me the necessity of addressing you, which cannot fail of impressing your mind with an uncommon degree of seriousness, especially when you consider how both of our characters are stigmatised by our own imprudence."

Gentlemen, since these parties are so sensible of their own

imprudence let us not widen the breach, but pour balm into their wounds; and let not the records of this court transmit to all posterity the quarrel of two who loved so dearly.

" You may, my dear *Jane*, assure yourself, upon the testimony of your dear husband, who has been taught by the most bitter experience that were our disappointments and perplexities known, which this embargo involved us into, it would extinguish, or at least mitigate the keenness of a reflection that we both must to eternity endure."

You see, gentlemen, although these parties appear before you like lord and lady *Racket*, yet their case is different. That was a quarrel three weeks after marriage, and for a game of cards. Here is a serious and public grief: that villanous embargo, that destroys the best of tempers, and sours the milk of human kindness. It perches on the merchant's desk and stares him in the face. It is in our beds and in our kneading troughs. It is in our dishes and our goblets. I swear I never railed at it till now. Perish commerce; but let connubial love be undisturbed.

" Let no one be ashamed of suffering for what is his demerits, and like *Job* be an example of patience. The sufferings of our blessed Saviour, who suffered for us, suffering beyond the knowledge and the most refined researches of human skill to delineate, full of mercy and examples to follow with all patience. Certainly that the feeling of our hearts teach us how possible it is for one person to love another, and have respect for every thing belonging to either. Do not mothers show their love for their darling child when dead by keeping its hair and setting it in costly rings and bracelets? Do not all mankind pay a respect to the pictures of their deceased friends or near relations and other things that belongs to them? This is universally the natural disposition of the human heart."

The title of his love: of his diploma, the title of his rank and honour.

" I want my certificates I let you have that ever memorable *Tuesday* morning when you ran after me, when I came from *Clarkson's*, the collector's. Likewise the summons I had since

I came here for me to attend the medical society which I gave you here, &c.

"I have nothing more to observe; as I ever have, may I still continue, your affectionate friend and dear husband."

WILLIAM LITTLE, M. D.

Gentlemen, it was thus that PETRARCH would have written to his LAURA. Who can say whether, had he been fortunate enough to possess her, he might not in some unlucky moment, even from excessive love, have beat her? particularly if there had been a vexatious embargo in his day, which made those who never before bestowed upon their wives but kisses and caresses, give them blows. But oh that husbands would learn in every case to know their duties and submit.

" I want my certificates."

Meaning perhaps, his marriage certificate.

The counsel then turning to the lady, asked her in a pathetic tone, if she could be so obdurate as to prosecute the man who doated on her charms? She replied in an accent full of sensibility, that if the Court would forgive, she would love him more than ever. Mr. S. then desired him to offer her his arm, which she accepted, and called to the officer, to make way for the family of Doctor *Little*.

The manner in which this was done, added strongly to the matter. The Court and jury were constrained to abandon their gravity. The attorney general, after an ineffectual conflict between mirth and decorum, was unable to interpose; and before any order could be made, the fond couple had disappeared from among the crowd, to enjoy once more the pleasures of domestic life, and have not since appeared in public.

BIOGRAPHICAL SKETCH

OF

THOMAS LORD COVENTRY,

Late Lord Keeper of the Great Seal of England.

Some notable observations in the course of his life, and ultimum vale *to the World.**

TO trace him in the beginnings and first exposition, hee was the sonne of a judge† and of the Common Pleas, a gentleman by birth and education. The acquirings of his father in the progresse of his profession (as it seemes) were not much, and in that accesse (as I may call it), which commonly men of the law (attaining to that dignitie) leave to their heires in the new erection of a family. Wherefore I conceive it probable, that the sonne did not declyne that profession wherein the father concluded, but began there to buyld on that foundation, where himselfe had made his first approaches.

He was of the inner house of court,‡ and noe soonere by an

* Copied from an original manuscript.

† *Thomas Coventry* the father of the Lord Keeper, was born in 1547, and was educated at *Baliol* College, where he took a degree of bachelor of arts, in 1565. He afterwards entered as a student of the *Inner Temple*, and in the 38th year of queen *Elizabeth's* reign was chosen autumn reader of that house; but a great plague then reigning in *London*, his readings did not commence until the *Lent* following. On the 17th of *May*, 1603, (1 *Jac.* 1.), he was sworn sergeant at law, having been elected to that degree by queen *Elizabeth;* and in 3d *Jac.* 1. was appointed king's sergeant, and in the same year, one of the justices of the court of Common Pleas, in which post he continued until his death, which happened on the 12th of *December*, 1606.

‡ Lord Keeper *Coventry* was born in 1578, and at the age of fourteen bebecame a gentleman commoner of *Baliol* college, *Oxford*, where he continued three years, and was then entered a member of the Inner Temple. In 14 *James* 1. he was chosen autumn reader of that society; and on the 17th

indefatigable diligence in study attained the barr, but he appeared in the lustre of his profession above the common expectation of men of that forme, which he made good in the manifestation of his exquisite abilities soe soone as he came to plead. For the orator at the barr hath much the start of a chamber-man, but he was *in utrumque paratus*, and here hee first began to grow into the name of an active and pregnant man.

Hee marryed and interred his first love in the fruyt of his *primogenitus*, now surviving, a baron and peere of the realme. His wife expiring, hee plighted his faith to the cittie (for he became recorder by a publique suffrage and suite of the citizens), and espoused for his second wife* the widow of a citizen, lovely, young, rich, and of good fame, in whom he became the father of many hopefull children of either sexe; all married richly in his life, or left in the waye of a noble substance. Wee may represent his happiness in nothing more than in this, that *London* had first given him the handsell of a place both honorable and gainefull, together with a wife as loving, as himself was uxorious, and of that sort which are not unaptly styled housewives; soe that these two drew diversely, but in one way, and to one and the selfe same end, hee in the practice of his profession, shee in the exercise of her domestic: for they

of *November*, of the same year, was elected recorder of the city of *London*. On the 14th of *March* following he was made solicitor-general, and received the honour of knighthood two days afterwards at *Theobald's*. He was appointed attorney-general by king *James* 1., in the 18th year of his reign.

† His first wife was *Sarah*, daughter of *Edward Sebright*, of *Besford*, in the county of *Worcester*, and sister to Sir *Edward Sebright*, by whom he had issue *Thomas*, his successor. By his second wife *Elizabeth*, daughter of *John Aldersey*, of *Spurstow*, and widow of *William Pitchford*, Esq. of the city of *London*, he had four sons and four daughters. Sir *John Coventry*, the eldest son of this second marriage, was the person upon whom the violent and inhuman outrage was committed by Sir *Thomas Sandys* and three others, at the instigation of the Duke of *Monmouth*, for words spoken in the House of Commons, and which occasioned the act of parliament "*for preventing malicious maiming and wounding*," since called the *Coventry Act*. *Elizabeth*, the youngest daughter, was married to Sir *John Packington*, and is said to have been the author of *The Whole Duty of Man*.

that knew the discipline of his house averr, that hee waved that care as a contagious distraction to his vocation, and left her only (as a helper) to manage that charge, which best suyted to her conversation.

The next stepp of his, however, was in the service of the late king of ever blessed memorie, as his solicitor, and successively his attorney-generall, both places of trust and of great income; neither did he then leave the cittie, or the cittie desert him, for by the marriage of his eldest son there* (the now baron) hee heaped up to his other acquisitions a bulke of treasure of no common summe, and leaving it so, that it may well fall into the question, whether he was more beholden to the cittie, or the cittie to him; or thus, whether more may be attributed to his fortune than merit. Moreover, they ascribe much to the blessing of his house, that they both were constant in their religion, and serious in their assiduous devotions in the sett and fixed forms of the church prayers, whereunto the whole family were commendably assembled.

In the first year of our now gracious soveraigne, my lord of *Lincolne* (of the clergy) being removed, Sir *Thomas Coventrie* was designed at *Salisbury* for the seale,† by the king's most excellent judgment, as the onely person of the times capable of so high a place, with the assistance of the duke of *Buckingham*, and one that was a noble preferrer of men of meritt; and to the further augmentation of his house, hee was shortly thereupon created baron of *Alisbury*,‡ in which dignity and place he con-

* *Thomas*, the second Lord *Coventry*, married *Mary*, daughter of Sir *William Craven*, Knight.

† He was made lord keeper of the great seal of *England* by king *Charles* 1. on the 1st of *November*, 1625.

‡ On the 10th of *April*, 1628, he was made a baron by the title of Baron *Coventry* of *Aylesborough*, in the county of *Worcester*. In an elegant preamble to the patent, the following weighty reasons are stated for his advancement.

" Rex, &c. omnibus, &c.—Officio et curæ regali nihil magis arbitramur convenire, quam virtutum præmia viris illustribus rite disponere, ac illos honoribus attollere qui de rege et republica optime meruerunt: perspicimus enim coronam nostram regiam quamplurimum honorari et locupletari, cum viros cordatos consilio, prudentia, virtutibus illustres, ac praesertim in ad-

tinued without interruption, until death summoned him to a great pitch of glorie, in an age plentiful in years, abundant in wealth, felicious in offspring, and, that which is more honorable, a noble fame; not that hee passed on unaccused, for envy is a constant follower and a persecutor of all greatness, and [*distraction*] an utter enemy of desert.

The chiefe charge against him was that of *Bonham Norton's*, wherein the best and most impartial judgments consent, that his accuser and clyent was much to blame in the error of his accompt, betweene a judge of equitie and a quondam advocate, and in a case where the accuser had before received ample satisfaction by the advantage and rigour of the law.* More than this, I find not much of regard charged on his sinceritie, besides those of vulgar mindes and private interest, where men are ever aforehand in flattery of themselves in opinion of that cause which goes not on their side, and that which hath any relation to their friends.

The character of his outward man was this; hee was of a middle stature, somewhat broad and round faced, of hayre black, and upright in his comportment and gesture; of complexion

ministranda justitia strenuos et insignes, ad honoris et dignitatis gradus vocamus et erigimus. Nos igitur in persona prædilecti et perquam fidelis consiliarii nostri Thomæ Coventry Militis, custodis magni sigilli nostri Angliae, gratissima et dignissima servitia, quae idem consiliarius noster tam praecharissimo patri nostro Jacobo Regi beatae memoriae, per multos annos, quam nobis ab ipsis regni nostri primis auspiciis, fidelissime et prudentissimè praestitit et impendit, indiesque impendere non desistit: nec non circumspectionem, prudentiam, strenuitatem, dexteritatem, et fidelitatem ipsius Thomae Coventry Militis erga nos et coronam nostram, animo benigno et regali intimè recolentis pro gratiae nostrae erga praefatum consiliarium pignore: nec non virtutum et bene meritorum ejusdem encomio posteris suis relinquendum, ipsum in procerum hujus regni nostri Angliae numerum ascribendum decrevimus.—Sciatis itaque, &c."

* We have examined the reporters of the time in order to give some account of the case here alluded to, but can only find a short reference to it in *Lev.* 179, *Middleton* v. *Shelley*, where it is said, that an agreement subsequent to a decree should stay the execution of it; and that it was so decreed in Lord *Coventry's* time, in *Bonham Norton's* case. This probably is the suit, which gave rise to the charge against Lord *Coventry*, noticed by his biographer.

sanguine, and of a comely aspect and presence. Hee was of a very fine and grave elocution, in a kind of graceful lisping, soe that where nature might seeme to cast something of imperfection in his speech, on due examination, she added a grace to the perfection of his delivery; for his words rather flowed from him in a kind of native pleasingness, than by an artificial help or assistance. Hee was of a very liberal accesse and affable, and as hee was of a very quick apprehension, soe was he of an exceeding judicious and expeditious dispatch in all affairs either of state or of the tribunal; of hearing, patient, attentive, and that which is not usually incident to persons of dignitie and place, seldome in any distempered mood or motion of choler; and it was none of his meanest commendations, that he was a helper or coadjutor, rather than a daunter, of counsel at the barr, and understood better what they would have said in the case, than what sometymes they did say for their clyents; soe that there appeared in his constitution, a kind of natural and unaffected inclination to creep into the good opinion of all men, rather than any affected greatness to discountenance any, but never rashly to discontent many.

Through the whole course of his life, his fortune was so obsequious, that it seemes she always waited upon him with a convoy; for in all the stepps of his rise, he had ever an even and smooth passage, without any rubb or mate in the check.

For his erudition and acquisitions of art (though all knew he was learned in the sciences, and most profound in his profession) yet such was the happiness of his constellation, that he rather leaned to his native strength, than depended on any artificial relyance.

Without doubt hee was of a most solid and immoveable temper, and voyd of all pride and ostentation; neither was he ever in any umbrage or disfavour with his prince; an argument both of his wisdome and sinceritie; neither in any fraction with his equalls, worthie of exception: for that of my lord of *Suffolke's* business, was an art of his that shewed the world, in how little esteeme he held greatness that would justle and stand in competition with justice: and it is remaining among the best

of his memorials, that he always stood impregnable, and not to be overcome by might. Amongst all and the many felicities of his life, that of his short sickness, and the willing embracement of death with open armes, were of the most remarkable observation, for it is *finis qui coronat opus*, and changes a mortalitie into that of immortall glorie, for his sickness was not contynued with any lingering or loathsome languishing, nor so precipitate that it bereaved him of the abilitie of disposing of his estate, to the contentment of his posteritie, or hindered the composing of his thoughts to another and better worlde.

If then in the briefe collection of the state of this noble man's fortune, it may fall into suspicion that I had some relation to his person, or in some one respect or other was obliged to him, I assume the liberty to tender this testimonie to the world, that I never had referrence, at any tyme, to his service (onely in such addresses as fell to my lot as a suppliant). I had ever the honor of a free accesse, with libertie to speak as I could, and as occasion and the cause required, but that which best may satisfye the suspicious, that I have not given myselfe the least scope of partialitie, or flattery, either in favour or affection, it is that I believe noe subject ever suffered in that degree in losse of estate, as I myselfe have endured, and onely by a rule of his owne, in suspending my suyte in the starr chamber, (the cause depending before in chancerie) untill it had there a final determination, whereby I was debarred from detecting as villainous a practice as this age hath heard of, unless I would have waved my chancery suyte without further application to be releeved in equitie, which (as I then apprehended) were some conditions of some hard measure, though by good reasons I was afterwards persuaded, it stood not with the honor of both courts, that two suytes for one and the self same title, should be on foot together; yet was it then informed by his noble successor (and then of my councell) that the cause depending in the starr chamber, was not for the title questioned in chancerie, but for privie combination and practice, committed in a triall at law, some yeares before, at an assise at *Sarum;* to which his lordship replied, that true it was

the tytle was not directly questioned in the starr chamber bill, yet did it conduce thereunto, and so reported by the Chiefe Baron *Walter*, that in case the defendant came to be censured by that court, it utterly destroyed both the former verdict, and the tytle in law.

And thus much for myne owne apologie; and soe to proceed: where I must not leave out of the number of his vertues, that he was ever more led by a very noble conduct in the choyce of his servants, which I am bold to say were gentlemen of civilitie, readye to perform all the good offices of urbanitie, in presenting the meanest suytor to their lord, which (as I have taken it as an observation of myne owne) was infused (if I be not deceived) by his own instruction and disciplination.

The faculty of his dispatch in court is best presented in this: that at his first accession to the seale, hee found two hundred causes on the paper ready for hearing, all which (with such as fell in his way) he determined within the yeare, soe that the clients of the court did not languish in expectation of the issue of their causes.

Where it falls into observation, that this high place is rarely well served, but by men of law, and persons of deepest judgment, in the statute and common lawes of the land, whereby they may distinguish of cases, whether they lye proper in that court, to be releeved in equitie, without intrenching on the jurisdiction of the kingdome, which is the old inheritance of the subject.

And thus have I briefly traversed the life and fortunes of this noble lord, I shall now close it up in the judgment of some notable personages and counsellors of state, which with one consent, and within a few days of his decease, concluded thus:

That the king had lost a most noble servant of state, irreproveable in his place, and in his life and conversation, of a very noble report, and that the kingdom suffered in losse with the king, in this, that the roome of the chancellor hath not been supplyed with his life, within the memory of our fathers: and (if report be not injurious to truth) his majesty, in recommending the seale to this noble gentleman, enjoyned him to tread

in the stepps of his predecessor. *Memoria justorum remanebit in æternum.*

Now to this little modell of his praise and vertue, I know somewhat of course may be expected to bee said of his vices, for man is composed of humane flesh and frailtie, and the best of men are all subject unto error. *Justus septies in die labitur.*

And who is he that feeleth not in himself the force of his owne corrupt nature, and the contagion of our first father's transgression, streaming through the veines of their infected posteritie? Surely modest men may say, that this noble man had not the priviledge of canonization, to bee sainted in earth, and that nothing of blackness could be laid to his eye, during the whole course of his life: but when wee consider his estate, now it is translated to another world, *livor post fatum quiescit*, and that envy which is soe emphatically fabled *in avarum et invidum*, becomes checked by the respect of prophanation, and feare of trampling on the sacred ashes of the dead, yet I am not ignorant what murmurs have passed on his integritie tacitly, charging it in implicit tearmes of playing the game dexterously and closely, and that if our faults could be all pencilled in our foreheads, this deceased lorde might then beare in front, sufficient arguments of his humane frailtie.

However, thus much I say, that could he have beene painted to the life (and I believe it) wee should not find in him much of blemish, and that the maine objection vulgarly inferred on the amassing of his wealth, could not well be done in justice, might be answered to the full in this, that his patrimonie considered, and that it was the gainefulness of the places he passed through, together with the greate fortune of his owne and his sons intermarriages, all concurring and falling into a frugall family, might soone wipe away all imputations of the most malignant, and perswade even [distraction] itselfe to suffer him to rest in peace, and (as wee may charitably beleeve) in glorie, as his posteritie surviving, remaines in his honor and fortune.*

* He died at *Durham* house, in the Strand, on the 14th of *January*, 1639—40, and was buried at *Croom D'Abitot*, in *Worcestershire*, near his

father, on the 1st of *March* following, after holding the seals sixteen years. Lord *Clarendon*, in his history of the rebellion, has drawn his character with so much force, that we shall conclude with an extract from it. " He discharged all the offices he went through with great abilities and singular reputation of integrity, and he enjoyed his place of Lord Keeper, with an universal reputation (and sure justice was never better administered) for the space of sixteen years, even to his death, some months before he was sixty years of age. Which was another important circumstance of his felicity, that great office being so slippery, that no man had died in it before, for near the space of forty years: nor had his successors, for some time after him, much better fortune

" He was a man of wonderful gravity and wisdome, and understood not only the whole science and mystery of the law, at least equally with any man who had ever sate in the place, but had a clear conception of the whole policy of the government both of church and state, which by the unskilfulness of some well meaning men, justled each other too much. He knew the temper, disposition and genius of the kingdom most exactly; saw their spirits grow every day more sturdy, inquisitive and impatient; and therefore naturally abhorred all innovations; which he foresaw would produce ruinous effects. Yet many who stood at a distance thought he was not active and stout enough in opposing those innovations. For though, by his place, he presided in all public councils, and was most sharp sighted in the consequence of things, yet he was seldom known to speak in matters of state, which, he well knew, were for the most part concluded before they were brought to that public agitation; never in foreign affairs, which the vigour of his judgment could well have comprehended: nor indeed freely in any thing, but what immediately and plainly concerned the justice of the kingdom; and in that, as much as he could, he procured references to the judges. Though in his nature he had not only a firm gravity, but a severity, and even some morosity, yet it was so happily tempered, and his courtesy and affability towards all men so transcendant, and so much without affectation, that it marvellously recommended him to men of all degrees, and he was looked upon as an excellent courtier, without receding from the native simplicity of his own manners.

" He had, in the plain way of speaking and delivery, without much ornament of elocution, a strange power of making himself believed (the only justifiable design of eloquence); so that though he used very frankly to deny, and would never suffer any man to depart from him with an opinion, that he was inclined to gratify, when in truth he was not; holding that dissimulation to be the worst of lying: yet the manner of it was so gentle and obliging, and his condescension such to inform the persons whom he could not satisfy, that few departed from him with ill will and ill wishes.

" But then this happy temper and these good faculties rather preserved him from having many enemies, and supplied him with some well-wishers, than furnished him with any fast and unshaken friends; who are always procured in courts by more ardour and more vehement professions and ap-

plications than he would suffer himself to be entangled with; so that he was a man rather exceedingly liked than passionately loved; insomuch that it never appeared that he had any one friend in the court, of quality enough to prevent or divert any disadvantages that he might be exposed to. And therefore it is no wonder, nor to be imputed to him, that he retired within himself as much as he could, and stood upon his defence, without making desperate sallies against growing mischiefs, which he well knew he had no power to hinder, and which might probably begin in his own ruin. To conclude, his security consisted very much in his having but little credit with the king; and he died in a season the most opportune, in which a wise man would have prayed to have finished his course, and which, in truth, crowned his other signal prosperity in the world."